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Supreme Court, U.S.
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In The
Supreme Court of the United States

INTERSTATE POWER COMPANY,

Petitioner,

vs.

DANIEL MARTINS and
COLEEN MARTINS,

Respondents.

On Petition For Writ Of Certiorari To The Iowa Supreme Court

PETITION FOR WRIT OF CERTIORARI

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186 pp

QUESTIONS PRESENTED

1. Does the ruling by the Iowa Supreme Court imposing strict liability against a multi-state electrical utility for the use of a particular legislatively-approved electrical distribution system collectively burden the multi-state transmission and distribution of electricity to a degree that negatively impacts interstate commerce, when the undisputed evidence is that the "nuisance" system upon which that and future liability is premised is used everywhere in this country, by every utility, every commission that regulates those utilities, and by every state except for "part of California, maybe Florida and one city in Michigan?"

2. Do the principles of justice inherent in due process and equal protection require the restraint of one branch of state government from imposing strict liability for conduct established, legislated, approved and regulated by another branch of the same state government, or may one branch of government lawfully compel a citizen to act in a prescribed manner, while another branch of the same government lawfully holds the citizen strictly liable for doing so?

3. Is the Iowa Supreme Court's refusal to accept and adopt the Iowa Legislature's standard of multi-grounded Wye distribution systems a violation of the separation of powers doctrine?

4. Do the rulings of the Iowa Appellate Court and the Iowa Supreme Court constitute a governmental taking without compensation when they identify no state interest advanced for refusing to acknowledge Interstate's easement, its property

QUESTIONS PRESENTED – Continued

rights in its multi-state transmission and distribution systems, and its investments made in reliance on and in compliance with all applicable state and national codes?

PARTIES

Petitioner is Interstate Power Company, which at the time of the events complained of in the underlying action, operated as an electrical and gas utility in four states. While the case was pending below, Interstate Power Company merged with two other utilities to form a single entity, now known as Alliant Energy, providing electrical service in Wisconsin, Iowa, Illinois and Minnesota.

The Iowa Association of Municipal Utilities, the Iowa Association of Electric Cooperatives and the Iowa Utility Association participated in the Iowa Supreme Court case with the Court's permission and filed an Amicus Curiae Brief in support of Petitioner's position.[1]

Respondents are Daniel and Coleen Martins, residents of the State of Iowa.

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[1] The Amicus Curiae appearing before the Iowa State Supreme Court are associations comprised of utilities operating within the State of Iowa. The Iowa Association of Electric Cooperatives is a trade association representing 38 distribution cooperatives providing electric service at retail to member consumers in their assigned service areas in the state of Iowa and five generation and transmission cooperatives providing wholesale electric distribution service to the distribution cooperative members in the State of Iowa. The Iowa Association of Municipal Utilities is a non-profit corporation representing the common interests of more than 550 municipal electric, gas, water and telecommunications utilities in Iowa. The Iowa Utility Association is a trade Association representing the interests of certain investor-owned utilities in Iowa.

CORPORATE DISCLOSURE

Alliant Energy Corporation, ("Alliant Energy"), is a registered holding company under the Public Utility Holding Company Act of 1935, as amended (the "Act"). Alliant Energy's stock is publicly traded on the New York Stock Exchange under the symbol LNT. Alliant Energy is not aware of any person or entity that owns in excess of five percent (5%) of its outstanding shares. Alliant Energy's wholly owned public utility subsidiaries are Wisconsin Power & Light Company ("WPL"), South Beloit Water, Gas and Electric Company ("SB WGE"), and Interstate Power and Light Company ("IPL") (collectively, the "Operating Companies"). Each of Alliant Energy, WPL and IPL are registrants under the Securities Exchange Act of 1934 and the most recently filed 10-Q is dated September 30, 2002. Together, the Operating Companies provide public utility service to approximately 940,000 electric and 400,000 retail gas customers in parts of Illinois, Iowa, Minnesota and Wisconsin. Each of WPL and IPL have debt issues and preferred stock outstanding.

Alliant Energy's direct non-utility subsidiaries include Alliant Energy Corporate Services, Inc., a mutual service company under the Act ("AECS"), and Alliant Energy Resources, Inc. ("AER"), which serves as the holding company for substantially all of Alliant Energy's investments in non-utility subsidiaries ("Non-Utility Subsidiaries"). AER has debt issues outstanding.

Alliant Energy Investments, Inc., Heartland Properties, Inc. and LNT Communications LLC, Non-Utility Subsidiaries of AER hold a minority interest in McLeod USA, Inc., a Delaware corporation, a publicly traded

CORPORATE DISCLOSURE – Continued

company on the NASDAQ small cap market (Symbol: MCLD) which provides integrated local and long distance telecommunications services. AER also owns a minority interest in Capstone Turbine Corporation (Symbol: "CPST") a publicly traded stock on the NASDAQ that manufactures and distributes micro turbines for the generation of electric energy.

IPL has its principal business office located in Cedar Rapids, Iowa. IPL is the result of a merger on January 2, 2002 of Interstate Power Company with and into IES Utilities Inc. The survivor of the merger was IES Utilities Inc. which simultaneously changed its name to Interstate Power and Light Company. IPL is a corporation organized and existing under the laws of the State of Iowa and is engaged primarily in the generation, transmission, distribution and sale of electricity at wholesale and retail.

WPL has its principal business office located in Madison, Wisconsin. WPL is a corporation organized and existing under the laws of the State of Wisconsin and is engaged primarily in the generation, transmission, distribution and sale of electricity at wholesale and retail.

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PETITION FOR A WRIT OF CERTIORARI

Interstate Power Company respectfully petitions this Court for a Writ of Certiorari to review the decision of the Supreme Court of Iowa in this case.

OPINIONS BELOW

On April 10, 2000, the Iowa District Court in and for Clayton County entered judgment against Interstate Power Company and in favor of the Martins on the sole count of nuisance. (App. 20)

On April 10, 2002 Senior District Court Judge Peterson, assigned to the Iowa Court of Appeals by order pursuant to Iowa Code § 602.9206, in an unpublished opinion, affirmed the district court judgment. (App. 20)

On June 28, 2002 the Iowa Supreme Court granted Interstate's Application For Further Review (App. 86-113) and on July 3, 2002 granted the Amicus Curiae Application (App. 41) filed by and on behalf of the Iowa Utility Association, the Iowa Association of Municipal Utilities and the Iowa Association of Electric Cooperatives. (App. 79-85)

On October 9, 2002 the Iowa Supreme Court, with two of the seven Justices dissenting, issued the Opinion for which review is sought. *Martins v. Interstate Power Company*, 652 N.W.2d 657 (Iowa 2002). (App. 1-19) On November 7, 2002, the Iowa Supreme Court denied Interstate's Petition For Rehearing. (App. 43)

JURISDICTION

The Iowa Supreme Court denied Interstate's Petition For Rehearing on November 7, 2002. Jurisdiction of this Court is invoked under 28 U.S.C. § 1257(a).

CONSTITUTIONAL AND STATUTORY PROVISIONS INVOLVED

I. United States Constitution, Article I, Section 8, provides in relevant part:

> The Congress shall have Power . . . To regulate Commerce . . . among the several States.

II. United States Constitution, Amendment 14, Section 1.

> All persons born or naturalized in the United States, and subject to the jurisdiction thereof are citizens of the United States and of the State wherein they reside. No state shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States; nor shall any State deprive any person of life, liberty, or property, without due process of law; nor deny to any person within its jurisdiction the equal protection of the laws.

III. United States Constitution, Article I – The Congress.

> Section 1. *Legislative Power Vested in Congress.* All Legislative Powers herein granted shall be vested in a Congress of the United States, which shall consist of a Senate and House of Representatives.

IV. United States Constitution, Article II – The President.

> Section 1, Clause 1. *Executive Power* . . . The Executive Power shall be vested in a President of the United States of America.

V. United States Constitution, Article III – The Judiciary.

> Section 1. *Judicial Power*. The Judicial Power of the United States, shall be vested in one Supreme Court, and in such inferior Courts as the Congress may from time to time ordain and establish.

VI. Iowa Constitution, Article 3, Section 1.

> The powers of the government of Iowa shall be divided into three separate departments – the legislative, the executive, and the judicial: and no person charged with the exercise of powers properly belonging to one of these departments shall exercise any function appertaining to either of the others, except in cases hereinafter expressly directed or permitted.

VII. Iowa Constitution, Article I, Section 6.

> All laws of a general nature shall have a uniform operation; the General Assembly shall not grant to any citizen, or class of citizens, privileges or immunities, which, upon the same terms shall not equally belong to all citizens.

VIII. Iowa Code § 474.1 Creation of Division and Board - Organization.

> A utilities division is created within the department of commerce. The policymaking body for

> the division is the utilities board which is created within the division. . . .

IX. Iowa Code § 474.4 General Jurisdiction of Utilities Board.

> The utilities board has general supervision of all pipelines and all lines for the transmission, sale, and distribution of electrical current for light, heat, and power pursuant to chapters 476, 476A, 478, 479, 479A, and 479B and has other duties as provided by law.

X. Iowa Code § 478.18. Supervision of construction – location.

> The utilities board shall have power of supervision over the construction of said transmission line and over its future operation and maintenance.

XI. Iowa Administrative Code 199-25.1(1).

> Purpose and intent. The rules apply to electric and communication utility facilities located in the state of Iowa and shall supersede all conflicting rules of any such utility. These rules are intended to promote safe and adequate service to the public, to provide standards for uniform and reasonable practices by utilities, and to establish a basis for determining the reasonableness of such demands as may be made by the public upon the utilities. This rule shall in no way relieve any utility from any of its duties under the laws of this state.

XII. Iowa Administrative Code 199-25.2 (476, 476A) Iowa Electrical Safety Code Defined.

The standard minimum requirements for the installation and maintenance of electric substations, generating stations, and overhead and underground electric supply or communications lines adopted below, collectively constitute the "Iowa Electrical Safety Code."

XIII. 199-25.2(1) National Electrical Safety Code.

The American National Standards Institute (ANSI) C2-2002 "National Electrical Safety Code" (NESC) as ultimately conformed to the ANSI-approved draft by correction of publishing errors through issuance of printed corrections is adopted as part of the Iowa electrical safety code.

STATEMENT OF THE CASE

On November 27, 1996, the Martins filed their Petition in this cause, originally seeking recovery from Interstate Power Company, ("Interstate") in four separate divisions, being counts of strict liability, negligence, trespass, and nuisance, for damages alleged to have been caused by stray voltage. (App. 21, 42) Approximately two weeks before trial, the Martins voluntarily dismissed three of the four counts they had pled, and the case was tried on the sole count of common-law nuisance. (App. 21)

The Martins' allegations concerned an electrical phenomenon commonly known as "stray voltage," which is a condition inherent in the delivery of electrical service, and governed by the law of physics. (App. 8, 119) The evidence relied upon by the Martins to support their claim of nuisance was testimony of stray voltage claimed to result from Interstate's use of a multi-grounded Wye distribution system. (App. 116) According to the

undisputed testimony presented by the Martins themselves, and affirmed by Interstate's electrical experts, the multi-grounded Wye distribution system is used everywhere in this country, by every utility, every commission that regulates those utilities, and by every state except for "part of California, maybe Florida and one city in Michigan." (App. 117) According to the Martins' expert electrical engineer, apart from people generating their own electricity, the only way Interstate could avoid creating this "nuisance" complained of by the Martins was for Interstate to reject state code, national code and industry standards and practice. (App. 114-115)

Liability in this case was assessed against Interstate for one reason – the use of a particular system (the multi-grounded Wye distribution system) specified and approved by the Iowa Legislature, the Iowa Utilities Board and the Code of Iowa, as well as the National Electric Safety Code. (App. 117-118) The Iowa Legislature has assigned to the Iowa Utilities Board the responsibility and power to supervise the construction, operation and maintenance of electric lines under Iowa Code § 478.18. (p. 4 of this Pet. for Writ) The Utilities Board has, in turn, set standards applicable to electrical utilities in Iowa, which require utilities to comply with the Iowa Electric Safety Code as codified in 199 Iowa Administrative Code, Chapter 25.

Liability was assessed against Interstate on the theory of nuisance alone, for a condition indisputably inherent in the delivery of electrical service, with no claim or evidence of negligence. (App. 1-19) Interstate's lines were in complete compliance with Code requirements, as adopted by one branch of Iowa's state government. (App. 114-115)

In reliance on the Code of Iowa, the National Electric Safety Code, and the easements held by it, Interstate expended vast sums of money in constructing its systems for delivery of electrical service in Iowa and in the three other states served by it, in accord with the Code requirements promulgated by the Legislature and the Iowa Utilities Commission and in accord with the National Electric Safety Code. (App. 114-115) Interstate also expended large sums of money in obtaining from its customers, such as the Martins, easements for the transmission of electricity "on, through, over and across" their property. (App. 33)

Despite the Iowa Supreme Court recently holding that an easement is "a right to maintain a nuisance," and that easements entitle their owners to do acts which, were it not for the easement, would otherwise constitute a nuisance, and despite Interstate having a perpetual easement to transmit "electric or other power on, through, over and across" the Martins' property, the Iowa Supreme Court, in affirming the decision that Interstate was a nuisance, denied Interstate the benefit of an absolute defense under the common law recently propounded by that same Court in *Bormann v. Board of Sup'rs In and For Kossuth County,* 584 N.W.2d 309, 315 (Iowa 1998). (App. 123) In its Opinion the Iowa Appellate Court identified no state interest advanced in doing so. Though the issue was raised with the Iowa Supreme Court in Petitioner's Application for Further Review (App. 86-113), the Court refused to consider or review the Appellate Court's decision on that issue and gave no rationale for that part of its ruling. (App. 1-19)

Justice Cady, in his dissent warned, *inter alia*,

> "The effect of the majority decision is to impose a form of strict liability on a utility in a stray voltage case. Nearly sixty years ago, we expressly

> said that a utility 'can only be held liable for its own negligence.' *Blackman*, 234 Iowa at 862, 14 N.W.2d at 723. Moreover, this concept was recently reaffirmed in *Schlader v. Interstate Power Co.*, where we refused to allow the concept of strict liability to creep into a stray voltage case brought against the utility. *Schlader*, 591 N.W.2d at 12. Furthermore, we indicated our legislature has expressed its intent not to impose strict liability regarding stray voltage. *Id.* at 13 . . . . The decision of the majority is not only contrary to our prior cases and the intent of our legislature, it is against the great weight of authority from other jurisdictions . . . " (App. 19)

It is from this decision, so described by one of the Iowa sitting Justices, and joined by another, that Interstate seeks certiorari.

REASONS FOR GRANTING THE PETITION FOR CERTIORARI

There are four reasons for granting a writ of certiorari in this case:

1. The ruling by the Iowa Supreme Court imposing strict liability against this multi-state electrical utility for its use of a particular legislatively-approved electrical distribution system collectively burdens and interferes with the multi-state transmission and distribution of electricity and negatively impacts interstate commerce;

2. The principles of justice inherent in due process and equal protection require restraining government so that one branch of government may not compel a citizen to act in a legislatively

prescribed manner, while another branch of the same government holds the citizen strictly liable for doing so;

3. The Iowa Supreme Court's refusal to accept and adopt the Iowa Legislature's standard of multi-grounded Wye distribution systems is a violation of the separation of powers doctrine and an improper exercise of police power from which Interstate has no other avenue of redress or protection; and

4. The rulings of the Iowa Appellate and the Iowa Supreme Court, identifying no state interest advanced for refusing to acknowledge Interstate's easement, its property rights in its multi-state transmission and distribution systems, and its investments made in reliance on and in compliance with all applicable state and national codes, constitute a governmental taking without compensation.

ARGUMENT

A. A Single Uniform Rule Is Necessary So That The Unimpeded Flow Of Electricity Throughout These Connecting National Systems Is Not Obstructed By One State's Description As "Unreasonable Interference" The Use of The Very System That Is Prescribed and Provides For That Unimpeded Flow.

Under Iowa law for a condition or conduct to be a "nuisance", it must be unreasonable. The undisputed evidence is that the "nuisance" system complained of in this cause is used everywhere in this country, by every utility, every commission that regulates those utilities, and

by every state except for "part of California, maybe Florida and one city in Michigan." The undisputed evidence is that the system complained of in this cause is not only legislatively approved in Iowa, but also accepted and adopted by the National Electric Safety Code. Iowa Administrative Code 199-25.1 specifically states that the purpose of these regulations is to provide standards for "reasonable practices" by utilities.

Yet, what by Code and the Legislature is a "reasonable practice", is now by Judicial Opinion an "unreasonable interference." Aside from the untenable position in which Interstate (and all other utilities in Iowa) now find themselves within the state of Iowa, Interstate must also deal with how it will handle the transmission and distribution of electricity throughout its unified system which extends beyond the borders of Iowa into three other states. Because the use of electricity is national in character and the method of its transmission and distribution is very nearly uniform nationally, a single uniform and uniformly enforceable rule is vitally necessary so that the unimpeded flow of electricity throughout these connecting national systems is not obstructed by one state's description as "unreasonable interference" the use of the very system that provides for that unimpeded flow in nearly all of the rest of the nation.

The transmission of electric energy is recognized as necessary to the public interest, and the transmission of electricity is a matter regulated as interstate commerce. *Jersey Central Power & Light Co. v. Federal Power Commission,* 319 U.S. 61, 63 S. Ct. 953, 87 L. Ed. 1258 (1943). Even though the distribution of electricity for some purposes appears to be a local activity, in the sense that one utilities' physical starting and ending point may be geographically situated within the borders of a single state,

Congress has passed laws regulating its transmission because interstate commerce is so affected by this regulated activity that it is necessary to protect against the nationwide effects of adverse consequences. *Cf. Gulf States Utilities Company v. Federal Power Commission,* 411 U.S. 747, 93 S. Ct. 1870, 36 L. Ed. 2d 635 (1973). For Interstate, and other multi-state utilities, the aggregate cost of complying with multiple regulations, a burden uniquely placed on these electrical utilities, interstate in nature and business, is oppressive and in effect extends the authority of the state of Iowa and its Supreme Court beyond its borders. A State's imposition of direct burdens on interstate commerce should fall, regardless of purpose. Should all states attempt to individually consider and decide this issue, with the probability of varied and various rulings, cumulative burdens would be imposed on very nearly every one of this country's electrical utilities, resulting in a direct burden on interstate commerce and resulting in either oppressive economic burdens borne by the available payment source, i.e., the citizen electrical consumers, or perhaps resulting in the complete breakdown of the electrical service network upon which our national lives and survival have become dependent.

Exercise of reasonable care is a standard which has long and well served our civil justice system and its litigants. This standard provides a serviceable guide both for conduct and for the just and fair adjudication of that conduct. The use of this standard permits the parties – whether plaintiff or defendant – to anticipate a certain result if reasonable care has been exercised, and to anticipate quite a different result if it has not. It is especially important in the case of these interconnected public service utilities that the exercise of reasonable care be the

standard applied to questions of their conduct. Electricity is not merely a fact of life today. It is a requirement. It is not that we couldn't live as well without it. It is that we could not live at all without it. Because of that, the transmission and distribution of electricity has become a heavily regulated public service. Utilities need to know that so long as they conduct themselves in compliance with applicable codes, and so long as they conduct themselves in complete accord with nationwide industry standards and practices, when questions of their conduct are raised and whether that conduct has caused harm to their customers, these utilities will be judged by the standard of whether they have exercised reasonable care. Without that assurance, public service utilities will have absolutely no guide for their conduct, and no basis for the important decisions they must make which affect all of us and every aspect of all our lives. Without that assurance, any and every utility could find itself in the position in which Interstate found itself in this case – follow all applicable codes and industry custom and practice, and face a $700,000.00 verdict for nuisance because it did, or reject applicable codes and industry custom and practices, and face such a verdict for negligence because it did not. It is respectfully submitted that no utility is strong enough to withstand assessment of liability without findings of fault, particularly when as in this case, that assessment rests on complaints regarding a condition in accord with the laws of physics and inherent in the very delivery of electricity.

B. For Citizens To Be Caught Between Two Branches Of Government, Subjected To Catastrophic Consequences Regardless Of And Only Because Of Which Branch Of Government They Choose To Accept As Authoritative Offends the Principles Of Justice Rooted In Our American Traditions And Our American Conscience.

The Iowa Legislature through the statutorily created Iowa Utilities Board regulates the construction and safety of electric lines and electrical delivery systems. The Legislature is empowered to create a public utilities commission and delegate legislative powers to it, subject to standards to be provided by the Legislature, but such delegation cannot be made to the courts, even by express legislative enactment. *Iowa-Illinois Gas & Electric Co. v. City of Fort Dodge*, 248 Iowa 1201, 85 N.W.2d 28 (1957). It is undisputed that liability in this case was assessed against Interstate for one reason only, the use of a system (the multi-grounded Wye distribution system) approved alike by the Legislature, the Utilities Board, the Code of Iowa and the National Electric Safety Code. It is undisputed that Interstate's lines were in complete compliance with those Code requirements, as prescribed by one branch of Iowa's state government. Yet, according to the Opinion of another branch of this same state government, that very compliance and use is held as a "nuisance," that is, by definition, "unreasonable." One branch of Iowa's state government, then, tells this corporate citizen what it must do and after it has done what it has been compelled to do, another branch of the same government then assesses liability against the same corporate citizen for doing it. What could be more offensive to the principles of justice rooted in our American traditions and conscience than for

citizens to be caught, as Interstate has been, between two branches of government, subjecting them to catastrophic consequences regardless of, and only because of, which branch of government they choose to accept as authoritative? Can it possibly be in accord with the founder's intent that citizens, even corporate ones, should be so caught between and under the wheels of government that they may no longer even commercially survive? Isn't the answer long ago expressed, but as yet unacknowledged by the Courts so far considering this case, "No?"

Interstate advances no new or unique principle, but asks only that a principle long ago given *imprimatur* by early sages in the law be equally and justly applied to it. "Where authority is given by the Legislature to do an act, parties damaged by the doing of it have no legal remedy, but should appeal to the Legislature" 7 Common Bench 266. *Damnum absque injuria.* Interstate, having legislative authority to use the Wye distribution system was acting within its rights. Interstate then did a lawful thing in a lawful way, as directed by the Legislature, and without negligence. If the Legislature, acting within its Constitutional limitations, directs or authorizes the doing of a particular thing, the doing of it in the authorized way and without negligence cannot be wrongful and if damage results as a consequence of its being done, it is *damnum absque injuria*, and no action will lie for it. *See, Bennett v. Mt. Vernon & Twogood*, 124 Iowa 537, 100 N.W. 349 (1904) (where it was held that a municipality had the authority to lay water mains in its streets, and had the power to contract with a third person to do the work, and if, in the prosecution of it, private damage occurred, in the absence of negligence, the case is one of *damnum absque injuria.*)

See, also, Missouri Pacific R.R. Co. v. City of Omaha, 35 S. Ct. 82, 83 where it is stated:

> "That a railway company may be required by the state or by a duly authorized municipality acting under its authority, to construct overhead crossings or viaducts at its own expense, and that the consequent cost to the company as a matter of law is *damnum absque injuria,* or deemed to be compensated by the public benefit which the company is supposed to share, is well settled by prior adjudications of this Court.
>
> This is done in the exercise of the police power, and the means to be employed to promote the public safety are primarily in the judgment of the legislative branch of the government, to whose authority such matters are committed, and so long as the means have a substantial relation to the purpose to be accomplished, and there is no arbitrary interference with private rights, the courts cannot interfere with the exercise of the power by enjoining regulations made in the interest of public safety which the legislature has duly enacted."

In *Fleming v. Richardson*, 237 Iowa 808, 24 N.W.2d 280 (1946) the Iowa Supreme Court acknowledged that the Legislature, acting within its sphere, is presumed to know the needs of the people of the state, is charged with selecting the means to safely meet those needs and is charged with selecting the means which the Legislature "deems to be appropriate to the end to be achieved." In the same case, citing a United States Supreme Court case, the Iowa Supreme Court agreed "When the subject lies within the police power of the state, debatable questions as to reasonableness are not for the courts but for the Legislature,

which is entitled to form its own judgment, and its action within the range of discretion, cannot be set aside because compliance is burdensome." *Id.* at 289.

Yet in this cause, despite these cited rulings of the Iowa Supreme Court and despite these cited rulings of this Supreme Court, Interstate bears liability in this case. Moreover, Interstate, with all utilities, faces unfathomable exposure to future liability because in using the Wye distribution system it complied with that which the Legislature and national industry code and standards deemed to be the appropriate means to achieve the delivery of electricity. In assessing liability as a nuisance, in the absence of negligence, now the Iowa courts have expressly challenged and rejected the reasonableness of the Legislature's appropriate exercise of its police power. And by assessing liability against Interstate, the courts of Iowa interfered with that exercise of legislative power by telling Interstate that either it is essentially in effect enjoined from following legislative prescription in the delivery of electricity, or it will be held strictly liable for doing so.

Further, Interstate has expended substantial sums of money in obtaining from its customers, such as the Martins, easements for the transmission of electricity "on, through, over and across" their property. Though the Iowa Supreme Court recently held that an easement is "a right to maintain a nuisance," and that easements entitle their owners to do acts which, were it not for the easement, would otherwise constitute a nuisance, and even though Interstate has a perpetual easement to transmit "electric or other power on, through, over and across" the Martins' property the Iowa Supreme Court, in affirming the decision that Interstate was a nuisance, denied Interstate the benefit of an absolute defense under the common law

recently propounded by that Court in *Bormann v. Board of Sup'rs In and For Kossuth County,* 584 N.W.2d 309, 315 (Iowa 1998.) Because Interstate was treated differently from others similarly situated, Interstate was therefore denied the equal protection of the law. *Bailiff v. Adams County Conference Bd.*, 54 F. Supp.2d 923 (S.D. Iowa, 1999). But the purpose of the equal protection clause of the Fourteenth Amendment is to secure every person within a state's jurisdiction against arbitrary discrimination by the state, whether occasioned by express terms of a statute or by improper execution of the law. *Village of Willowbrook v. Olech*, 528 U.S. 562, 120 S. Ct. 1073, 145 L. Ed. 2d 1060 (2000). It is for the judicial branch of the government to determine whether any department has exceeded its constitutional functions and to review the constitutionality of government behavior. *Luse v. Wray*, 254 N.W.2d 324 (Iowa 1977). But when the perceived unconstitutionality directly results from state high court judicial rulings, citizens have no avenue of redress, other than petitions such as this one. A denial of a writ in this situation, then, is a denial not only of constitutional protection, but also a denial of redress.

C. This Exercise Of Police Power By A Body Not Charged Under The Separation Of Powers Doctrine With That Exercise Is Potentially Detrimental To The National Public Welfare Because Of The Risk That Every Iowa Utility, And Eventually Every Other State's Utilities, Failing To Insulate Themselves From Absolute Liability, May Cease The Transmission And Distribution Of Electricity.

The police power under which our government acts exists to promote the public health, safety and welfare, so

that the exercise of police power should rightly assume that the public interest will prevail. Yet, the only relation to the public welfare and interest that this exercise of governmental power by the Iowa Supreme Court bears is detrimental. Further, it is an exercise of police power by a body not charged under the separation of powers doctrine with that exercise, and more than that, it is an exercise completely contradictory to the dictates of the body truly and properly charged with that exercise. The Constitutional vesting of judicial power in the courts implies the limitation that courts may not and will not exercise legislative or executive powers. *U.S. v. Manning*, 215 F. Supp. 272 (W.D. La., 1963). Congress has the power of legislation and thereby the power to pass judgment upon the needs of a complex society. *Polish Nat. Alliance of U.S. v. N.L.R.B.*, 322 U.S. 643, 64 S. Ct. 1196, 88 L. Ed. 1509 (1944). The principles which best serve the public interest in the area of delivery of electrical services are legislated and embodied within the Code of Iowa, corresponding Iowa administrative regulations, and the National Electric Safety Code.

If a writ of certiorari is not granted in this case, those principles can provide no certainty or predictability other than the sure and certain prediction that Iowa's and virtually every other state's already over-burdened judicial systems will be inundated with allegations of nuisance, threatening the commercial viability of the electrical utilities upon which nearly every aspect of our national and individual lives depend. Society will ultimately bear the costs of that litigation. If this Judgment is permitted to stand, the measures every utility will be required to take to either replace all existing systems or to somehow insulate themselves from liability, or failing that, the

cessation of the transmission and distribution of electricity, will be a catastrophic cost and insupportable burden borne by all of us. To construe the common law in such a way as to permit the maintenance of a claim for nuisance, in the complete absence of negligence, solely because the defendant utility uses a distribution system approved by the state Legislature is to abrogate the laws which have been enacted by the state Legislature and the state Utilities Commission, and to replace them with new common law. The branches of government need not be entirely separate and distinct, but rather have a degree of overlapping responsibility, a duty of interdependence as well as independence, the absence of which precludes the establishment of a nation capable of governing itself effectively. *Channon v. United Parcel Service, Inc.*, 629 N.W.2d 835 (Iowa 2001). That degree of interdependence is not evidenced in the Opinion from which this writ of certiorari is sought.

D. Interstate Has Expended Substantial Sums Of Money In Obtaining Easements, Constructing Its Systems For Delivery Of Electrical Service In Accord With The Code Requirements Promulgated By The Legislature, The Iowa Utilities Commission And The National Electric Safety Code, So That If Certiorari Is Not Granted, Interstate's Vested Property Rights Are Destroyed Without Compensation And With Deprivation Of Due Process As Interstate Is Caught Between The Differing Dictates Of Two Independently Operating Branches Of Government.

The Constitution does not require a literal appropriation of property before there is a "taking", and a serious

interruption in the use of one's property and regulation reaching an "extreme" is a taking even though no property is actually taken in a literal sense. *Pennsylvania Coal Co. v. Mahon,* 260 U.S. 393, 43 S. Ct. 158, 67 L. Ed. 322 (1922). The service provided by electrical utilities like Interstate is a public service, regulated by the Legislature, which has assigned to the Iowa Utilities Board the responsibility and power to supervise the construction, operation and maintenance of electric lines. Iowa Code § 478.18 (2001) The Board has, in turn, set standards applicable to utilities. In reliance on the Code of Iowa, those administrative regulations, and in reliance on the easements held by it, Interstate has expended substantial sums of money obtaining easements and in constructing its systems for delivery of electrical service in accord with those Code requirements as promulgated by the Legislature and the Iowa Utilities Commission. Interstate therefore has vested and protected property rights, which rights government may not take away, at least not without adequate compensation. *West v. Chesapeake & Potomac Telephone Company of Baltimore*, 295 U.S. 662, 55 S. Ct. 894, 79 L. Ed. 1640 (1935). But if certiorari is not granted, Interstate's vested property rights in its systems and its easements are destroyed, without compensation and without due process since all expenditures, constructions and actions for which Interstate is now found liable were made under and in complete accord with the law of Iowa. Interstate is entitled to the Constitutional protections afforded every other citizen against such governmental conduct, but in the operation of its business Interstate is now left to either ignore the dictates of the Legislature or ignore the Iowa Supreme Court's ruling, with either decision resulting in sure and certain claims and judgments of liability against it. How can a legitimate business be more unreasonably restricted in its operation

than to be caught between the decidedly differing dictates and decisions of two independently operating branches of government? Can it be denied that there is a very fundamental unfairness for a citizen such as Interstate, and indeed every utility in the State of Iowa, and potentially the nation, to face the certain barrage of nuisance claims and concomitant inescapable liability premised on the combination of the inherent nature of electricity and compliance with legislative fiat and industry standard? And then, rather than receive compensation for such a taking, to instead be required to pay for it?

CONCLUSION

A mechanism for disaster, entirely too easily foretold, inheres in this case. One of the most dangerous and explosive areas of the law is liability without fault, a principle that for nearly sixty years was held in Iowa as expressly inapplicable to utilities. Yet, as written by the Dissent, the Iowa Supreme Court's majority decision in this cause came down "contrary to our [Iowa's] prior cases" and contrary to "the intent of our [Iowa's] legislature," and against the "great weight of authority from other jurisdictions."

If certiorari is not granted by this Court, then utilities are not merely left exposed to claims of nuisance for stray voltage, but they are left unprotected from absolute liability. The laws of physics may neither be abrogated nor overruled by legislatures, the courts or utilities. And so long as stray voltage is inherent in the delivery of electricity, and so long as the Wye distribution system remains and persists as the legislative code standard, while at the

same time is held as the judicial definition of "unreasonable interference," utilities are the victims of the rankest and most offensive deprivation of due process.

In order to survive, utilities will be forced to turn to their citizen consumers. If rate increases are granted, the costs to the public can neither be calculated nor controlled. If rate increases are denied, a different type of cost will be borne by the public, that is, the loss of electrical service, a cost even less capable of calculation or control. Will we be a nation of individuals left with no alternative but either to sit in the cold and the dark, or generate our own electricity, as suggested by the Martins' electrical expert?

To foresee a problem is normally and properly the first step in avoiding it. But for government to create a foreseeable and avoidable problem, leaving a vulnerable public to pay the cost, violates the very heart of the Constitution and crosses the lines of protection drawn and promised by it. That law which exacts without reason is not law at all.

Petitioner is aware that many Constitutional issues are innocent of significant and national economic consequences. Petitioner respectfully submits that no such innocence is to be found here.

Petitioner seeks only for the Legislature to be permitted to act unchallenged within its Constitutional confines; for the courts to be required to do so, and for utilities to escape liability, in the absence of negligence, for doing no more than accepting and following the laws of physics and the laws of the Legislature.

Although the Supreme Court of the United States follows the latest settled adjudications of the state courts giving construction to the laws of their own states, it will

not follow any adjudication to such an extent as to make a sacrifice of justice and law. *Gelpecke v. City of Dubuque*, 68 U.S. 175, 17 L. Ed. 520 (1863). The result obtained from one branch of government holding as "unreasonable" what another has legislated as the acceptable and reasonable standard is not only a sacrifice of justice and law, it is a sacrifice of the very justification for citizens ever entrusting to government the care and responsibility for justice and law.

In this time of significant national stress can we afford to hazard the unified, interconnecting grid that is our national electrical system? Can we afford to add to our nation's current turmoil by creating an electrical energy crisis? Petitioner submits that we cannot, and therefore respectfully requests the Court grant this Petition for Writ of Certiorari.

Respectfully submitted,

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APPENDIX

Iowa Supreme Court Order 10/9/02 Affirming Iowa Court of Appeals.....App. 1

Iowa Court of Appeals Opinion 4/10/02 Affirming District Court Judgment.....App. 20

Supreme Court Order 7/3/02 granting leave to file amicus curiae brief.....App. 41

Iowa District Court Judgment 4/10/00.....App. 42

Iowa Supreme Court Order 11/7/02 overruling Petition for Rehearing.....App. 43

Petition for Rehearing in the Supreme Court.....App. 44

Brief of Amicus Curiae .....App. 58

Amicus Curiae Application.....App. 79

Application for Further Review & Brief in Support of Application for Further Review .....App. 86

Trial Transcript of testimony of Respondent's Expert Witness William English .....App. 114

Non-Standard Service Agreement (trial exhibit)...App. 119

Bormann v. Board of Sup'rs In and For Kossuth County, 584 N.W.2d 309 .....App. 123

IN THE SUPREME COURT OF IOWA

No. 121/00-0791

Filed October 9, 2002

DANIEL MARTINS and
COLEEN MARTINS,

Appellees,

vs.

INTERSTATE POWER COMPANY,

Appellant.

On review from the Iowa Court of Appeals.

Appeal from the Iowa District Court for Clayton County. James Beeghly. Judge.

Interstate Power Company seeks further review of court of appeals decision affirming district court judgment on a jury verdict in favor of plaintiffs. **DECISION OF COURT OF APPEALS AND JUDGMENT OF DISTRICT COURT AFFIRMED.**

Sheila Stuart Kelley and Christopher D. Stombaugh of Kopp, McKichan, Geyer & Skemp, L.L.P., Platteville, Wisconsin, Scott Lawrence of Lawrence & Desrochers, St. Nazianz, Wisconsin, and R. Craig Oppel of Allbee, Allison, & Denning, P.C., Muscatine, for appellees.

David L. Hammer, Angela C. Simon and Scott J. Nelson of Hammer, Simon & Jensen, Dubuque, for appellant.

Michael R. May, Ankeny, for amicus curiae Iowa Association of Municipal Utilities and Dennis Puckett of

Sullivan & Ward, P.C., Des Moines, for amicus curiae Iowa Association of Electric Cooperatives.

LAVORATO, Chief Justice.

The district court entered judgment on a Jury verdict in favor of Daniel Martins and Coleen Martins against Interstate Power Company (Interstate). We transferred the case to the court of appeals and that court affirmed. We granted Interstate's application for further review. On further review, we consider one issue: Whether the district court erred in submitting a "pure nuisance" claim without an accompanying negligence claim in a stray voltage case against an electric utility. Finding no error, we affirm the court of appeals decision and the judgment of the district court.

I. Background Facts and Proceedings.

From 1982 to March 1, 1997, Daniel Martins milked cows on a dairy farm just outside the city limits of Monona, Iowa. Daniel and Coleen were married in 1986. The Martins purchased the dairy farm from a finance company in 1991. Before that, Daniel's parents owned the farm. A dairy barn was built on the property in 1977. An Interstate substation sits less than a quarter mile to the west of the Martins' farm. The farm is between the city and the substation.

In March 1989, the Martins notified Interstate that they believed stray voltage was accessing their cows. Interstate investigated and attributed any problems to the Martins' own wiring on the farm.

In 1992, the Martins again notified Interstate that they believed stray voltage was accessing their cows. This

was after Daniel received an electric shock from the bulk tank and off the barn steel. Field representatives from a dairy to which the Martins sold milk found excessive alternating current from the utility at cow contact points in the barn. Interstate conducted more testing and made some recommendations, but insisted that the stray voltage was not caused by its lines.

In April 1993, at the Martins' request, Interstate isolated the neutrals, which involves separating the farm neutral from the utility neutral (separating the Martins' and Interstate's electrical systems). Testing after the isolation confirmed there was no stray voltage.

In the early 1990s, Daniel first reported problems typically associated with stray voltage to his veterinarian. The veterinarian described the Martins' herd as "unruly" and characterized by "bad behavior." For example, cows would kick off their milkers, kick at their stomach, swing from side to side, and "do a lot of dancing." Cows were frightened and would not enter the barn.

After Interstate isolated the neutrals in 1993, the Martins' veterinarian noted that "the cow behavior instantly turned around, it was just like day and night." The cows began chewing their cuds and "appeared to be more comfortable in the barn." They started putting on weight and looked better. The somatic cell count dropped dramatically, and milk production increased.

In 1995 and 1996, however, the cows' behavior and condition began to deteriorate again. The Martins noticed abnormal behavior in the cows, and the somatic cell counts started increasing.

Sometime between 1985 and 1990, the local gas company found alternating current on the gas line at the Martins' dairy farm. In 1996, after more testing revealed the same problem, the gas company replaced the steel gas line with a plastic line.

In November 1996, the Martins filed this lawsuit against Interstate, seeking damages allegedly caused by stray voltage. The petition alleged four theories of liability: strict liability, negligence, nuisance, and trespass. Interstate denied the allegations and raised the affirmative defense of comparative fault.

Several months after this lawsuit was filed, the Martins' veterinarian advised them to move the herd off their farm. In March 1997, the Martins moved the herd to a farm four miles north. Cow behavior improved at the new location.

Meanwhile, in February 2000, the Martins voluntarily dismissed the strict liability, negligence, and trespass counts, proceeding solely on the nuisance count.

Following this dismissal, Interstate filed a motion for summary judgment as to the nuisance count. The district court denied the motion, and we denied Interstate's application for permission to appeal in advance of final judgment.

Thereafter the matter proceeded to trial. The jury returned a verdict in favor of the Martins for $700,000. Following Interstate's appeal, we transferred the case to the court of appeals, which affirmed. We then granted Interstate's application for further review.

II. Issues.

Interstate raised numerous Issues on appeal. We address only one: whether the district court erred by applying a "pure nuisance" claim against the utility without an accompanying negligence claim. We conclude the court of appeals adequately addressed and correctly decided the issues we do not address.

III. Pure Nuisance Versus Nuisance With Accompanying Negligence Claim.

A. Generally. Iowa Code section 657.1 defines nuisance and provides for civil remedies:

> Whatever is injurious to health, indecent, offensive to the senses, or an obstruction to the free use of property, so as essentially to interfere with the comfortable enjoyment of life or property, is a nuisance, and a civil action by ordinary proceedings may be brought to enjoin and abate the same and to recover damages sustained on account thereof.

Iowa Code § 657.1 (1995). Iowa Code section 657.2 lists certain conduct or conditions deemed to be a nuisance.

The statutory definition of nuisance does not modify application of common law to nuisance. *Bormann v. Bd. of Supervisors,* 584 N.W.2d 309, 314 (Iowa 1998). "Rather, the statutory provisions 'are skeletal in form, and [we] look to the common law to fill in the gaps.'" *Id.* (quoting *Weinhold v. Wolff,* 555 N.W.2d 454, 459 (Iowa 1996)).

A private nuisance is "an actionable interference with a person's interest in the private use and enjoyment of the person's land." *Weinhold,* 555 N.W.2d at 459 (citation

omitted). "Parties must use their own property in such a manner that they will not unreasonably interfere with or disturb their neighbor's reasonable use and enjoyment of the neighbor's property." *Id.*

A public nuisance, the other form of nuisance, is "a species of catchall criminal offenses, consisting of an interference with the rights of the community at large." *Guzman v. Des Moines Hotel Partners, L.P.*, 489 N.W.2d 7, 10 (Iowa 1992). Examples include anything from the obstruction of a highway to a public gaming house or indecent exposures. *Id.* Here we are dealing with a private nuisance.

Whether a lawful business is a private nuisance

> depends on the reasonableness of conducting the business in the manner, at the place, and under the circumstances in question. Thus, the existence of [such] a nuisance does not depend on the intention of the party who created it. Rather, it depends on the following three factors: priority of location, the nature of the neighborhood. and the wrong complained of.

Weinhold, 555 N.W.2d at 459 (citations omitted). Whether a party has created and maintained a nuisance is ordinarily a fact question. *Id.*

There is a distinction between the concepts of "nuisance" and "negligence," which we explained in *Bormann*:

> Negligence is a type of liability-forming conduct, for example, a failure to act reasonably to prevent harm. In contrast, nuisance is a liability-producing condition. Negligence *may or may not* accompany a nuisance; negligence, however, is not an essential element of nuisance. If the condition

> constituting the nuisance exists, the person responsible for it is liable for resulting damages to others even though the person acted reasonably to prevent or minimize the deleterious effect of the nuisance.

Bormann, 584 N.W.2d at 315 (emphasis added) (citations omitted); *see also* 58 Am. Jur. 2d *Nuisances* § 9, at 676 (1989) (The tort concepts of negligence and nuisance "describe completely distinct concepts, which constitute distinct torts, different in their nature and their consequences. . . . [N]egligent acts do not, in themselves, constitute a nuisance; rather negligence is merely one type of conduct upon which liability for nuisance may be based, and thus, negligence is not a necessary ingredient of a nuisance.") In other words, nuisance simply refers to the results; negligence *might* be the cause. *Guzman.* 489 N.W.2d at 11.

The true distinction between negligence and nuisance is that "to constitute a nuisance 'there must be a degree of danger (likely to result in damage) *inherent* in the thing itself, beyond that arising from mere failure to exercise ordinary care in its use.'" *Id.* (emphasis added) (citations omitted).

Where a nuisance is based on negligence, however, liability for nuisance may depend upon the existence of negligence. *Id.* Where that is the case, apportionment of fault principles under Iowa Code chapter 668 apply. *Id. see also* 58 Am. Jur. 2d *Nuisances* § 82, at 735 ("[W]henever a nuisance has its origin in negligence, negligence must be proven, and the plaintiff may not avert the consequences of contributory negligence by affixing to the negligence of the wrongdoer the label of nuisance.").

B. Stray voltage. One court has described the concept of stray voltage this way:

> In order to understand stray voltage or neutral-to-earth voltage, one must first understand the neutral-grounded network. All electricity leaving an electrical substation must return to that substation in order to complete a circuit unless that circuit is completed, electricity will not flow. The current leaves the substation on a high voltage line which eventually connects to some electrical "appliance." After exiting the "appliance" that current must return to the substation. The neutral-grounded network provides the returning current two choices. Either it can return via the neutral line, which accounts for the second wire on our electrical poles, or it can return through the ground. These two pathways comprise the grounded-neutral network. Electricity flows through the path of lowest resistance. If there exists more resistance in the neutral line than in the ground, the current will flow through the ground to return to the substation.
>
> Neutral-to-earth voltage or stray voltage will occur when current moves from either the neutral line to the ground or from the ground to the neutral line. It uses a cow as a pathway if that animal happens to bridge the gap between the two. A cow's hooves provide an excellent contact to the earth while standing on wet concrete or mud, while at the same time the cow is contacting the grounded-neutral system consisting of items such as metal stanchions, stalls, feeders, milkers, and waterers. The current simply uses the cow as a pathway in its eventual return to the substation. Apparently very slight voltages can affect cattle. Evidence [has] suggested anything

> greater than one volt can be catastrophic to a dairy farm.

Larson v. Williams Elec. Coop., Inc., 534 N.W.2d 1, 1-2 n.1 (N.D. 1995) (farmer brought action against electric cooperative seeking recovery of damages to dairy farm allegedly caused by stray voltage); *see also* Peter G. Yelkovac, *Homogenizing the Law of Stray Voltage: An Electrifying Attempt to Corral the Controversy*, 28 Val. U.L. Rev. 1111, 1117-19 (Spring 1994) [hereinafter Yelkovac]. A cow in contact with stray voltage experiences a slight electrical shock, and repeated exposure to these slight shocks causes a cow to develop severe behavioral and physiological problems "rendering the cow a much less-effective milk producer." Yelkovac at 1111. Yelkovac suggests that the sources of stray voltage most often stem from problems in an electrical provider's transmission and distribution system or in a farmer's wiring or equipment, or from a combination of problems in the electrical systems of both the provider and farmer. *Id.* at 1112. The writer also suggests that "[s]ome stray voltage may always be present as an *inherent* part of supplying electricity; however, problems in the electrical systems can elevate the levels of voltage to an undesirable level, causing an electrical current to flow through the cattle and into the ground or earth." *Id.* at 1112-13 (emphasis added).

One method of controlling stray voltage, known as "isolation" (and attempted by Interstate in this case)

> mitigates the effects of stray voltage by preventing the voltage from reaching the cattle. Essentially, the most effective type of isolation involves the separation of the primary and secondary neutral wires so that the stray voltage cannot

> flow as easily into the fanner's electrical system from the power provider's system.

Id. at 1120.

C. Treatment of stray voltage claims in cases from other juridictions [sic]. Cases addressing the stray voltage issue are not consistent. As Yelkovac points out,

> [t]he body of law on the subject [of stray voltage], . . . lacks the uniformity that this highly technical area demands. For example, courts differ in their pronouncements of the duty owed by power providers to their dairy farm customers regarding stray voltage and in their willingness to allow strict products liability as a cause of action in stray voltage suits. Because of the lack of uniformity in this area, the law fails to address properly an inherently technical problem such as stray voltage. The disparate standards of care essentially ensure that a farmer's chance of recovery in a negligence action depends to a large degree upon the farm's location within a particular state. Moreover, the availability of a cause of action sounding in strict products liability facilitates the farmer's recovery by obviating the need for the farmer to demonstrate fault on the part of the power provider. Farmers in states that do not recognize this cause of action in stray voltage cases face greater difficulty in recovering under fault-based, negligence theories.

Id. at 1116. Interestingly, the writer does not discuss the application of nuisance theory to stray voltage cases. Rather, he limits his discussion to negligence and strict liability theories of recovery. He suggests a uniform

treatment of stray voltage cases that would define the standard of care and prohibit the use of strict products liability theory against power providers. *Id.* at 1154-58.

Courts have decided several stray voltage cases grounded on nuisance. *See, e.g., Jackson County Hog Producers v. Consumers Power Coop.,* 592 N.W.2d 112 (Mich. Ct. App. 1999); *Kuper v. Lincoln-Union Elec. Co.,* 557 N.W.2d 748 (S.D. 1996); *Kaech v. Lewis County Public Util. Dis. No. 1,* 23 P.3d 529 (Wash. Ct. App. 2001); *Vogel v. Grant-Lafayette Elec. Coop.,* 548 N.W.2d 829 (Wis. 1996); *Kolpin v. Pioneer Power & Light Co.,* 469 N.W.2d 595 (Wis. 1991); *Stunkel v. Price Elec. Coop.,* 599 N.W.2d 919 (Wis. Ct. App. 1999). In none of these cases was there any recovery on the sole theory of nuisance.

In *Kuper,* the South Dakota Supreme Court held the trial court erred in submitting a stray voltage case to the jury on the theory of nuisance. 557 N.W.2d at 761-62. The court relied on a South Dakota statute, which provided, "Nothing which is done or maintained under the express authority of a statute can be deemed a nuisance." *Id.* at 761 (quoting SDCL 21-10-2). Rural electric cooperatives, specifically authorized by South Dakota law, are required to construct, operate, and maintain their electrical distribution systems in accordance with the provisions of the National Electric Safety Code (which has been adopted in South Dakota). *Id.* Therefore, the court concluded, the South Dakota legislature "has made it quite clear that a public utility cannot be designated a nuisance." *Id.* The court noted that "[i]n granting an exemption from nuisance actions to statutorily authorized activities, our legislature obviously adopted a public policy that private interests must endure some inconvenience for the general populace to receive the benefits of utilities." *Id.*

In *Kaech,* the plaintiff argued that the trial court erred in dismissing plaintiff's claim based on nuisance. *Kaech,* 23 P.3d at 534. The court concluded that the plaintiff's allegation that stray voltage escaped from faulty insulators and damaged his dairy herd was essentially a "negligence claim with multiple theories." *Id.* at 541. Because "a nuisance claim that is simply a restated negligence claim need not be considered separately from the negligence claim," the court held that the trial court did not err in dismissing plaintiff's nuisance claim. *Id.*

In *Jackson County Hog Producers,* the appellate court affirmed the trial court's dismissal of a nuisance claim against an electric utility for damage allegedly caused by stray voltage. 592 N.W.2d at 117. The court concluded the nuisance claim was merely a restatement of the plaintiff's negligence claim, which was properly dismissed as barred by the statute of limitations. *Id.*

The Wisconsin Supreme Court has expressly adopted the Restatement (Second) of Torts section 822 into its law of private nuisance. *CEW Mgmt. Corp. v. First Fed. Sav. & Loan Ass'n.,* 277 N.W.2d 766, 767 (Wis. 1979). On the issue of private nuisance, the Restatement provides:

> One is subject to liability for a private nuisance if, but only if, his conduct is a legal cause of an invasion of another's interest in the private use and enjoyment of land, and the invasion is either
>
> (a) intentional and unreasonable, or
>
> (b) unintentional and otherwise actionable under the rules controlling liability for negligent

> or reckless conduct, or for abnormally dangerous conditions or activities.

Restatement (Second) of Torts § 822 (1979).

In *Vogel.* applying section 822 of the Restatement (Second) of Torts, the Wisconsin Supreme Court held that nuisance law is applicable to stray voltage claims "because excessive levels of stray voltage may invade a person's private use and enjoyment of land." *Vogel,* 548 N.W.2d at 834. The court also held that whether there was such an invasion was reserved for the trier of fact. *Id.* Finally, based on the record before it, the court concluded "that the trial court did not err by construing the nuisance action as an *unintentional invasion* and *otherwise actionable under negligence,* and by not submitting the question of intentional invasion to the jury." *Id.* at 837 (emphasis added). Finally, the court affirmed the trial court's judgment reducing the amount of damages for plaintiffs' contributory negligence, because "a nuisance claim based on an unintentional invasion is properly subject to the defense of contributory negligence." *Id.*

In *Stunkel,* the Wisconsin Court of Appeals applied and elaborated upon *Vogel. Stunkel,* 594 N.W.2d at 921-23. Dairy farmers brought a claim against their electric company on negligence and nuisance theories, alleging that excessive stray voltage caused by the electric company resulted in their herd's lower milk production. *Id.* at 921. The jury concluded the electric company was not negligent in permitting stray voltage to exist on the plaintiffs' farm, but also found the electric company operated its utility in a manner that created a nuisance. *Id.* The trial court concluded that the plaintiffs were not entitled to recover damages unless the jury had answered

the negligence inquiry affirmatively, and entered judgment dismissing the complaint. *Id.* The plaintiffs presented the court of appeals with one issue: whether a claim for private unintentional nuisance requires proof of actionable underlying conduct and, if so, whether such conduct was established in this case. *Id.*

Relying on Restatement (Second) of Torts section 822, the *Stunkel* court concluded that "no claim for private nuisance may be made without the underlying prerequisite conduct being proved." *Id.* at 923. Therefore, to recover for a private unintentional nuisance, the plaintiffs had to prove the underlying negligent conduct. *Id.* The court affirmed dismissal of the complaint, concluding that the record supported the jury's finding that the defendant did not engage in negligent conduct causing damage to the plaintiff. *Id.* at 924.

D. The merits. The foregoing survey of our nuisance cases makes clear that there can be a nuisance claim *without* an underlying actionable conduct, such as negligence, being proved. Additionally, such a claim can be established *without* a showing of intentional conduct. This, of course, is contrary to the position of the Restatement (Second) of Torts section 822, which this court has not adopted.

The key for such a stand-alone claim of nuisance is that the degree of danger likely to result in damage must be *inherent* in the thing itself. *Guzman*, 489 N.W.2d at 11. Excessive stray voltage from an electric utility resulting in damage to a dairy herd meets that test.

Interstate and amicus assert that permitting users of electricity to obtain large judgments against utilities without proving the utilities' negligence, fault, or wrongdoing will

result in large economic and societal costs. They further assert that without assurance that a reasonable care standard will be applied when questions about the utilities' conduct arise, "public service utilities will have absolutely no guide for their conduct, and no basis for the important decisions they must make which affect the great mass of people they serve."

Interstate relies heavily on *Blackman v. Iowa Union Electric Co.*, 234 Iowa 859, 14 N.W.2d 721 (1944), to support its argument that a claim of nuisance against a utility can only be predicated upon negligence. In *Blackman,* the plaintiff sued an electric and gas company for personal injury and property damage caused by the escape of gas that flooded plaintiff's home. *Id.* at 860, 14 N.W.2d at 722. The plaintiff's petition alleged the defendant "negligently and carelessly allowed gas to escape from its mains and become a nuisance in plaintiff's property and to flood into and through plaintiff's property . . . occupied as his home." *Id.* The case was also tried on that theory. *Id.* at 862, 14 N.W.2d at 723. Therefore the case cannot support the proposition that a claim of nuisance against a utility can only be predicated upon negligence. Here, the Martins dismissed their negligence count and tried the case solely on the basis of nuisance.

Finally, Interstate contends that by allowing the Martins to proceed under a nuisance claim not predicated on negligence, the district court essentially applied a strict liability standard against the utility, in conflict with our decision in *Schlader v. Interstate Power Co.*, 591 N.W.2d 10 (Iowa 1999). In *Schlader,* the plaintiffs filed a petition raising counts of negligence, strict products liability, breach of implied warranties, breach of contract, and gross negligence. *Id.* at 11. Significantly, nuisance was not pled.

We affirmed the district court's summary judgment ruling against the plaintiffs on their strict liability claim that was premised on products liability under section 402A of the Restatement (Second) of Torts. *Id.* at 12-13. In doing so, we said: "It seems apparent that we would astonish the legislature if we were to adopt strict liability regarding stray voltage." *Id.* at 12. We noted the repeal of Iowa Code section 478.16 (1985), which had imposed a rebuttable presumption of negligence against a utility in case of injury to any person or property by an electricity line. *Id.* at 13. We viewed the repeal as "weigh[ing] strongly against strict liability." *Id.* We therefore refused to impose it. *Id.*

It is true that one could read *Schlader* as Interstate does, and come away with the impression that some underlying prerequisite conduct like negligence is necessary to establish liability against electric utilities in stray voltage cases. This, of course, conflicts with the present state of nuisance law in Iowa, an issue that we did not consider and address in *Schlader.* We therefore reject any impression one might draw from *Schlader* that some underlying prerequisite conduct is necessary to establish a nuisance claim against electric utilities in stray voltage cases.

Unlike South Dakota, Iowa has no statute exempting electric utilities from nuisance claims. The argument here, of course, is that we as a court should not wait for legislative action and should on our own adopt a similar stance in the name of public policy. We decline to do so. Any exception to our nuisance law with respect to electric utilities should come from the legislature and not from this court.

We conclude the district court correctly submitted the nuisance claim without an accompanying negligence claim.

DECISION OF COURT OF APPEALS AND JUDGMENT OF DISTRICT COURT AFFIRMED.

All justice concur except Cady, J., who dissents and Ternus, J., who joins this dissent.

#121/00-0791, *Martins v. Interstate Power Co.*

CADY, Justice (dissenting).

I respectfully dissent.

A common law claim for nuisance does not exist as a separate tort theory of recovery from negligence in every case, but only in those circumstances where there is a "'degree of danger (likely to result in damage) inherent in the thing [responsible for the harm], beyond that arising from mere failure to exercise ordinary care in its use.'" *Guzman,* 489 N.W.2d at 11 (quoting *Hall v. Town of Keota,* 79 N.W.2d 784, 790 (Iowa 1956)). This means that the inherent degree of danger must be something more than negligence. *Id.* If the harm is nothing more than negligence, there is no claim for nuisance. *Id.*

The majority incorrectly concludes that excessive stray voltage responsible for damage to a dairy herd meets this test of a nuisance. It does not, because the case only satisfies part of the test. Although some stray voltage is inherent in the process of supplying electricity, the undesirable levels of stray voltage responsible for harm to cattle result because of "problems in the electrical systems."

Yelkovac, 28 Val. U.L. Rev. at 1112-13. Stray voltage can be minimized or controlled by proper methods of distribution. *Id.* at 1119-20. Thus, the failure of a utility to properly minimize and contain stray voltage to an acceptable inherent level would be no more than negligence. The majority has created a case for nuisance that is not supported by law, facts, or science.

The effect of the majority decision is to impose a form of strict liability on a utility in a stray voltage case. Nearly sixty years ago, we expressly said that a utility "can only be held liable for its own negligence." *Blackman,* 234 Iowa at 862, 14 N.W.2d at 723. Moreover, this concept was recently reaffirmed in *Schlader v. Interstate Power Co.,* where we refused to allow the concept of strict liability to creep into a stray voltage case brought against the utility. *Schlader,* 591 N.W.2d at 12. Furthermore, we indicated our legislature has expressed its intent not to impose strict liability regarding stray voltage. *Id.* at 13.

The majority side-steps *Blackman* by pointing out that it involved mixed claims of negligence and nuisance, unlike this case. Yet, this is a distinction without a difference. The plaintiff in *Blackman* asserted claims for nuisance and negligence, but the court made it clear that the utility could not be subject to liability for nuisance, only negligence. *Blackman,* 234 Iowa at 862, 14 N.W.2d at 723. The court specifically held that because "proof of negligence was essential in this case, it cannot be said to be a nuisance action." *Id.* The court further concluded "a gas company is not liable as an insurer for injuries sustained as a result of the escape of gas." *Id.* Proof of negligence was essential because the harm inherent in transporting gas by pipes into homes is not so great that reasonable

care on the part of the utility could not make it safe. This law applies with equal force to this case.

The majority also limits the impact of *Schlader* by claiming that its application to this case conflicts with the existing law of nuisance. The conflict, however, is only on the surface, not in principle. Under our law of nuisance, there can be no claim for nuisance if the thing responsible for the harm involves only a breach of care. *Guzman,* 489 N.W.2d at 11. Under our long line of authority, supplying electricity is not so inherently harmful that reasonable care cannot make it safe. Consequently, the law of nuisance does not provide a remedy.

The decision of the majority is not only contrary to our prior cases and the intent of our legislature, it is against the great weight of authority from other jurisdictions. I would reverse the district court. Negligence was the only theory of recovery available to the plaintiffs in this case.

Ternus, J., joins this dissent.

IN THE COURT OF APPEALS OF IOWA

No. 1-517/00-0791
Filed April 10, 2002

DANIEL MARTINS and
COLEEN MARTINS,
Plaintiffs-Appellees,

vs.

INTERSTATE POWER COMPANY,
Defendant-Appellant.

Appeal from the Iowa District Court for Clayton County, James Beeghly, Judge.

Interstate Power Company appeals from the district court judgment entered on a jury verdict in favor of Daniel and Coleen Martins, operators of a dairy farm, on their stray-voltage nuisance claim. **AFFIRMED.**

David L. Hammer, Angela C. Simon, and Scott J. Nelson of Hammer, Simon & Jensen, Dubuque, for appellant.

Christopher Stombaugh of Kopp, McKichan, Geyer & Skemp, Platteville, Wisconsin, Scott Lawrence of Lawrence & Desrochers, St. Nazianz, Wisconsin, and R. Craig Oppel of Allbee, Allison & Denning, P.C., Muscatine, for appellees.

Heard by Sackett, C.J., Miller, J., and Peterson, S.J.*

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* Senior Judge assigned by order pursuant to Iowa Code section 602.9206 (2001).

PETERSON, S.J.

Daniel Martins and Coleen Martins (Martins) filed a petition at law seeking damages from Interstate Power Company (Interstate) caused by stray voltage. The petition asserted claims under strict liability, negligence, trespass, and nuisance. Two weeks before trial, Martins dismissed all claims except the claim of nuisance. A motion for summary judgment filed by Interstate, asserting that a claim against a utility must be predicated on negligence and the petition must now be dismissed, was denied. The case went to trial, and the jury awarded judgment in favor of Martins in the amount of $700,000. Interstate appeals, contending that errors by the trial court require a reversal of the decision. We affirm the trial court.

From 1982 to March 1, 1997, Martins milked cows on Daniel's family farm which adjoins the city of Monona. They had purchased the farm in 1997 from a finance company. It had previously been owned by Daniel's parents. A dairy barn was constructed on the property in 1997. Interstate has a substation serving Monona and the farm located less than one quarter mile west of the farm. The farm is between the city and the substation. From 1989 the cows exhibited some very strange behavior. They also did not produce expected quantities of milk and suffered an unusual amount of illnesses and injuries. In 1989 Interstate tested the area for stray voltage but reported to Martins that there was no problem. During tests in July 1992, representatives of the dairy company to which Martins sold milk received an electric shock from the bulk tank and off the barn steel. They also found excessive alternating current from the utility at cow contact points in the barn. Interstate again checked the farm during the summer and fall of 1992 but did not

inform Martins of any problems. In early 1993, Interstate suggested separating the farm neutral from the utility neutral. After the isolation of the neutrals, the cows' conduct improved substantially. The cows also put on weight, increased the milk production, and the somatic cell counts dropped.

In 1995 and 1996, the problems experienced in 1992 returned. In 1996 the natural gas company, in the process of placing plastic sections in the gas line, found abnormal amounts of AC current on the gas line on Martins' farm and reported it to Interstate. The herd continued to deteriorate and exhibit strange behavior through March 1997. The herd was moved to a different farm in March 1997 and, thereafter, improved substantially. The milk production increased, the strange behavior discontinued, the somatic cell counts dropped, and the cows gained weight normally. Experts had differing views concerning the source and existence of stray voltage and the effect of the stray voltage on the cattle.

Suffice it to say that issues relating to nuisances do not appear on the sea of tranquility. Rather, it appears whenever nuisance concerns are presented they land in troubled waters. "Confusion exists in statements of the legal basis of liability as applied to the law of nuisance because the term "nuisance" has been used indiscriminately to designate harmful results. . . . " *Taylor v. City of Cincinnati,* 55 N.E.2d 724, 729 (Ohio 1944). American courts have shown a deplorable tendency to call everything a nuisance and let it go at that. *Moran v. Pittsburgh Des Moines Steel,* 166 F.2d 908, 925 n.14 (3d Cir. 1948). The confusion on this score vanishes in large part, however, when proper heed is paid to the sound propositions that private nuisance is a field of tort liability rather than

a single type of tortious conduct; that the feature which gives unity to this field of tort liability is the interest invaded, namely the interest in the use and enjoyment of the land; that any substantial nontrespassory invasion of another's interest in the private use and enjoyment of land by any type of liability forming conduct is a private nuisance. *Morgan v. High Penn Oil Co.,* 77 S.E.2d 682, 689 (N.C. 1953).

Negligence and Nuisance. Martins' claim was based solely on the theory of nuisance. Interstate contends that the motion for summary judgment should have been sustained and the proceedings dismissed for the reason that any claim against an electric utility must include the assertion of negligence.

Iowa has long recognized a distinction between the claim of nuisance and the claim of negligence. The term "private nuisance" and "negligence" are in different classes. Negligence is a type of liability forming conduct. A private nuisance is a tort. It is a substantial and unreasonable interference with the interest of a private person in the use and enjoyment of his land. it has been called a type of harm. *Ryan v. City of Emmetsburg,* 232 Iowa 600, 604, 4 N.W.2d 435, 439 (1942). A private nuisance today is a condition or activity that interferes with the possessor's use and enjoyment of his or her land by incorporeal or nonpossessory invasions to such an extent that the landowner cannot reasonably be expected to bear without compensation. Dobbs, *The Law of Torts,* § 463 at 1321 (2000). It may be said that negligence is some act or omission in violation of a duty, while a nuisance is a dangerous, unsafe, or offensive condition resulting from some act or omission. *H. Christiansen & Sons v. City of Duluth,* 31 N.W.2d 270, 275 (Minn. 1948).

At the time of this trial the State of Iowa statutorily recognized a claim for damages based on nuisance. Iowa Code §§ 657.1, 657.2 (1999). The same provisions remain unchanged at this time. These statutory provisions do not modify the common law's application to nuisances. *Bates v. Quality Ready-Mix Co.,* 261 Iowa 696, 704, 154 N.W.2d 852, 857 (1967). These provisions are skeletal in form, and the courts look to the common law to fill in the gaps. *Weinhold v. Wolff,* 555 N.W.2d 454, 459 (Iowa 1996).

Interstate contends that they cannot be held liable in nuisance without a prerequisite showing of negligence. Authorities hold that any unreasonable or unlawful use of property which unreasonably interferes with the lawful use and enjoyment of other property is an actionable nuisance; that negligence is not an essential or material element of such an action; and that the actor is, as a rule, liable for the resulting injury to others notwithstanding the actor's exercise of skill and care to avoid such injury. *Ryan,* 232 Iowa at 605, 4 N.W.2d at 439. It is well established that the same acts or conduct may and often do create liability either for negligence or for nuisance; and while, generally speaking, a nuisance presupposes negligence, negligence is not necessarily one of the material elements of nuisance. Negligence is not vital to the establishment of an action based on nuisance. *Christiansen,* 31 N.W.2d at 275. While the same act may constitute negligence and also give rise to a private nuisance, a private nuisance may be created or maintained without negligence. It is well established that the existence of a nuisance is not "affected by the intention of its creator not to injure anyone." *Mel Foster Co. Props., Inc. v. Am. Oil Co.,* 427 N.W.2d 171,174 (Iowa 1988). Thus, unless there is an exception of an electric utility company from the claim of

nuisance, with the absence of negligence, the motion was properly overruled. Interstate contends that in Iowa a claim of nuisance against a utility can only be predicated upon negligence, citing *Blackman v. Iowa Union Elec. Co.,* 234 Iowa 859, 14 N.W.2d 721 (1944). The phrase "can only be predicated on negligence" used in *Blackman* was not intended to exclude all utilities from nuisance claims. *Blackman,* 234 Iowa at 862, 14 N.W.2d at 723. When read in context it can be stated that the court concluded that when a gas company is accused of negligent conduct *for the escape of gas,* the damages are based on the liability for the negligence. *Id.* (emphasis supplied). It may be concluded that the court in *Blackman* perceived that the escape of gas, not being a normal part of the operation of the utility, necessarily requires a determination that the escape was a result of some negligent act on the part of the gas utility before liability can be assessed. *Id.* In fact, *Blackman* follows the general rule that directs the court to determine the theory of the case that was tried. Notwithstanding what the case may be labeled, if the case is treated as a negligence case; that is, predicated on a negligent act or omission of a duty, it cannot be said to be a nuisance case. *Blackman* was pled and tried as a negligence case, thus negligence principles applied. *Blackman* did not intend to carve out an exception in the law favoring utilities and excluding them from the law of nuisance when the circumstances so warranted. Negligence is not vital to the establishment of an action based on nuisance. *Christiansen,* 31 N.W.2d at 275. The same acts or conduct may and often do create liability either for negligence or for nuisance; and while, generally speaking, a nuisance presupposes negligence, negligence is not necessarily one of the material elements of nuisance. *Id.* at 273-74. In this case, Martins relied solely on a claim of nuisance against

Interstate. They were very careful not to cross the line to assert a claim of negligence against Interstate, nor was the presentation of their case premised upon the utility's negligent acts. An action for damages for nuisance is not predicated on negligence. It is a condition, not an act or failure to act. If the wrongful condition exists, the person responsible for its existence is liable for resulting damage. *Kriener v. Turkey Valley Cmty. Sch. Dist.,* 212 N.W.2d 526, 530 (Iowa 1973); *Claude v. Weaver Const. Co.,* 261 Iowa 1225, 1229, 158 N.W.2d 139, 143 (1968). In Dobbs, *The Law of Torts,* § 463 at 1322, it is stated: "If the defendant's electromagnetic radiation or stray voltage invades the land, it is a nuisance if it is any tort at all." There appears to be no reasonable basis for carving out a special exemption for electric utilities from the law of nuisance without negligence.

Interstate contends the trial court should have applied negligence principles to Martins' claim and instructed the jury on Martins' comparative fault. The trial court declined to submit the issue of comparative fault. Iowa recognizes the cases of nuisance in which negligence is involved. In those cases, the concept of negligence and nuisance are interrelated and are referred to as negligence-nuisance cases. *Gusman v. Des Moines Hotel Partners, Ltd. P'ship,* 489 N.W.2d 10, 11 (Iowa 1992); *see also Awad v. McColgan,* 98 N.W.2d 571, 574 (Mich. 1959). But *Gusman* also makes a distinction between cases of nuisance based on negligence and nuisance without negligence. "In nuisance cases based on negligence, contributory negligence has been held to be a defense." *Gusman,* 489 N.W.2d at 11. The obverse thus follows: If the nuisance case is not based on negligence, comparative fault is not an issue. This concept has long been the law in

Iowa. The court in *Bowman v. Humphrey,* 132 Iowa 234, 109 N.W. 714 (1906), reached the conclusion that the doctrine of contributory negligence has no proper application to an action to recover damages for a nuisance. The court went on to state that nuisance is a condition, and not an act or failure to act on the part of the person responsible for the condition. *Bowman,* 132 Iowa at 237, 109 NW. at 715. If the wrongful condition exists, and the person charged therewith is responsible for its existence, he is liable for the resulting damages to others, though he may have used the highest possible degree of care to prevent or minimize the deleterious effects. *Id.* The trial court correctly declined to include an instruction on comparative fault in these proceedings.

Strict liability. Interstate contends the trial court, in effect, imposed a strict liability standard on the utility, asserting that *Schlader v. Interstate Power Co.,* 591 N.W.2d 10, 13 (Iowa 1999), determined that by the repeal of Iowa Code section 489.16 (1966) the legislature rejected the strict liability standard for utilities. Section 489.16 formerly provided:

> Injury to Person or Property. In case of injury to any person or property by any such transmission line, negligence will be presumed on the part of the person or corporation operating said line in causing said injury, but this presumption may be rebutted by proof.

Iowa Code § 489.16. This statute was repealed by 1986 Iowa Acts ch. 1198, § 1.

"Strict liability does not arise merely because a public utility is involved." *Schlader,* 591 N.W.2d at 120; *see also Northwestern Nat'l Ins. Co., v. Raid Quarries Corp.,* 249

N.W.2d 640, 645 (Iowa 1977). The elements of the claim for nuisance and a claim under strict liability are not the same. A lawful business, properly conducted, may still constitute a nuisance if the business interferes with another's use of his own property. *Weinhold,* 555 N.W.2d at 461; *Valasek v. Baer,* 401 N.W.2d 33, 35 (Iowa 1987). Strict liability, generally speaking, imposes responsibility for damages proximately caused by the mere existence of the dangerous instrumentality or condition. It is liability without fault. The defendant is subject to liability for conduct that amounts neither to negligence nor to any intentional tort. Dobbs, *The Law of Torts,* § 342 at 941 (2000). Although by statute the Iowa legislature has included strict liability under the provisions of Iowa Code section 668.1, nuisance is not strict liability. Each of the elements necessary to establish actionable nuisance must be presented before liability is imposed.

The issue of a claim for nuisance was not before the court in *Schlader. Schlader* did not abolish nuisance as a cause of action when a utility is involved.

Discovery. Interstate claims discovery violations on the part of Martins and asserts that such violations prejudiced Interstate and should have resulted in dismissal of the case. The standard for review is abuse of discretion by the trial judge. *Sullivan v. Chicago and N.W Transp. Co.,* 326 N.W.2d 320, 324 (Iowa 1982). The primary complaint relates to a denial of a motion for sanctions filed by Interstate. Interstate's experts were unable to enter and inspect Martins' farm when they understood the inspection should occur. The court declined to impose sanctions for the reason that the arrangement was informal and the court determined that there was not a clear and unambiguous understanding of the terms, conditions,

and timing of the inspection. The court further concluded that adequate advance arrangements for the inspections had not been provided. The court on January 20, 1998, then directed counsel to make formal request for entry upon the land pursuant to Iowa Rule of Civil Procedure 1.512(1). A "Request to Permit Entry and Notice" was filed by Interstate. Order was entered by the court on February 17, 1998, stating the following:

> The attorneys have agreed that they will consult with their expert witnesses and arrange a mutual time for experts of their choice to meet at the Plaintiff's farm where the alleged stray voltage has occurred, so that the experts can each observe the other in conducting tests and inspections.

Apparently, Martins' experts did testing in the absence of Interstate's experts, and Interstate learned of this testing during deposition of Martins' experts.

A motion to dismiss was filed by Interstate on February 3, 1999, asserting Martins' failure to comply with the February 17, 1998, order as the basis of the motion. A pretrial order dated March 17, 1999, addressing several pending issues before trial scheduled in March denied the motion for dismissal for failure to comply with the prior discovery stating, "the court finds no violation of Judge Beeghly's Order of February 17, 1998." No evidentiary record was made at that time. The issue was again before the court during trial concerning the limiting of the reference to the "agreement" of counsel relative to inspection, and the claimed violation thereof. No evidentiary record or proffer of evidence was presented.

It is expected that parties comply with discovery processes provided by the rules of civil procedure. Discovery rules should be liberally construed to effectuate disclosure of all relevant and material information to the parties. *Hutchinson v. Smith Labs., Inc.,* 392 N.W.2d 139, 140-41 (Iowa 1986). Discovery violations, as well as assertion of discovery violations, are serious concerns of the court. Because of their significance, it was essential that the matter be before the trial court upon an evidentiary record pursuant to the then existing rule 134 motion to compel. The district court is vested with wide discretion in rulings on discovery matters. *Pierce v. Nelson,* 509 N.W.2d 471, 473 (Iowa 1993). The record available to this court fails to support a conclusion that the trial court abused its discretion on this discovery issue.

Interstate makes other complaints concerning alleged discovery violations. These issues were not presented to the trial court in a manner that preserved the issues for appeal.

Spoliation. Interstate filed a motion to dismiss Martins' petition premised upon an assertion that during the pendency of the action, without notice to Interstate, Martins moved the affected cattle to another farm and also removed electrical equipment resulting in spoliation of evidence. Interstate contends that they did not have an opportunity for its experts to test the cattle and equipment while on the affected property. Hearing was held on the motion. We are not provided with a transcript of any record made of such hearing. After hearing the judge denied the motion finding:

> 1. The evidence clearly established that Martins moved their dairy herd to a different

farm, in an effort to mitigate their damages, and not for the purpose of "destroying" evidence.

2. Any presumption under Evidence Rule 301 has been overcome.

The nonproduction, alteration, or destruction of evidence is commonly referred to as spoliation. *State v. Langlet,* 283 N.W.2d 330, 333 (Iowa 1979). Spoliation is a rule of evidence that, if established, creates a presumption that the evidence and testimony, if produced, would be adverse to that party. Iowa R. Evid. 5.301; *Hendricks v. Great Plains Supply Co.,* 609 N.W.2d 486, 491 (Iowa 2000); *Gamerdinger v. Schaefer,* 603 N.W.2d 590, 595 (Iowa 1999); *Holmquist v. Volkswagen of Am., Inc.,* 261 N.W.2d 516, 523 (Iowa 1977). When established, the inference is regarded as an admission by conduct of the weakness of the party's case. *Langlet,* 283 N.W.2d at 333. The inference can only be based upon the intentional destruction of evidence and must be within the control of a party whose interests would naturally call for its production. *State v. Hulbert,* 481 N.W.2d 329, 334 (Iowa 1992); *Quint-Cities Petroleum Co. v. Maas,* 259 Iowa 122, 127, 143 N.W.2d 345, 348 (1966). A spoliation inference must be utilized prudently and sparingly. It must be applied in a fair and even manner to all parties. The party seeking the inference must generate a genuine factual issue whether the party in control of the evidence intentionally altered or destroyed it. If we permit the inference to be used in any lesser standard, the inference will lose its vitality and impose unfair sanctions. *Phillips v. Covenant Clinic,* 625 N.W.2d 714, 720 (Iowa 2001). In the absence of any transcript of the hearing on the motion to dismiss, this court is not in a position to determine that the trial judge abused his discretion when he did not rule in favor of Interstate

requesting dismissal on the spoliation issue. Even if established, it is an evidentiary issue, and it would rarely be sufficient to support a dismissal of the entire claim.

Evidence. Interstate raises issue with several evidentiary rulings of the trial court. We generally review evidentiary rulings for abuse of discretion. *Williams v. Hedican,* 561 N.W.2d 817, 822 (Iowa 1997).

A. Martins' initial pleadings asserted claims of negligence, strict liability, trespass, and nuisance. Shortly before trial Martins withdrew the claims based on negligence or strict liability. The trial court excluded evidence of the withdrawn pleadings. The generally accepted view is that withdrawn pleadings are admissible in evidence in the same case between the same parties to show that the pleader made a different claim at another time. 4 Wigmore, *Evidence,* § 1067 at 88-90 (Chadbourn Revision 1972). In *Katcher v. Heidenwirth,* 118 N.W.2d 52, 59 (1962), the supreme court held the opposite party was entitled to introduce inconsistent pleadings relating to the same issue into evidence for whatever the jury might find it worth in arriving at the truth of the controversy. The weight to be assigned was a question for the jury. *Katcher,* 118 N.W.2d at 59. The question before this court is whether the refusal to allow the pleadings to be admitted is prejudicial error. We review rulings of the district court on the admission of evidence for correction of errors at law. *Bangs v. Maple Hills, Ltd.,* 585 N.W.2d 262, 265 (Iowa 1998). "Error may not be predicated upon a ruling which admits or excludes evidence unless a substantial right of the party is affected." Iowa R. Evid. 5.103(a). We will not disturb the trial court's evidentiary rulings "unless there is a clear and prejudicial abuse of discretion." *Gamerdinger,* 603 N.W.2d at 594. We conclude that since the assertion of

negligence in the withdrawn pleadings did not constitute a judicial admission but rather only evidence of an alternate claim of basis for recovery by Martins, the failure to allow the admission of the pleadings did not constitute a prejudicial abuse of discretion by the trial judge.

B. Interstate claims error contending the trial court had no discretion but to instruct the jury on the existence of an easement in favor of Interstate on the affected property after the court had taken judicial notice of the easement, contending that Iowa Rule of Evidence 5.201 is a mandatory provision. The easement in question granted the right and privilege and authority for Interstate to "construct, operate, maintain a line of poles, wires and fixtures, for the purpose of transmitting electric or other power ... on, through, over or across" the southerly boundary of the affected property. Interstate misconstrues the action of the trial court on this issue. The trial court, in its colloquy on the issue, concluded the easement was insufficient to raise a fact issue regarding whether the conduct complained of was authorized by the easement and determined as a matter of law in construing the written instrument that the easement did not include the authorization to allow electric current to pass through the earth at such levels as to interfere with agricultural and other use of the dominant estate. We believe the trial court is correct on that issue. Martins had objected to the introduction of the easement document as irrelevant to the issues. The trial court sustained the objection. The trial court qualified the judicial notice of the document to "an offer of proof for this issue," thereby preserving the issue in the event of appeal. Under such limited purposes expressed by the court, the court is not required to instruct

the jury on the fact judicially noticed. The trial court did not err on this issue.

C. Dr. Michael Behr was presented as an expert witness by Martins. Interstate contends that he was allowed by the court to testify beyond his level of competence. Interstate's primary concern is Dr. Behr's criticism of some of the conclusions of the USDA Redbook, a treatise that addresses research on stray voltage. In *Mercer v. Pittway Corp.,* 616 N.W.2d 602 (Iowa 2000); (quoting *Mensink v. Am. Grain,* 564 N.W.2d 376, 380 (Iowa 1997)), the supreme court stated that "we are committed to a liberal view on the admissibility of expert testimony, and we have been quite deferential to the district court in the exercise of its discretion in that area." The analysis set forth in *Daubert v. Merrill Dow Pharm., Inc.,* 509 U.S. 579, 113 S. Ct. 2786. 125 L. Ed. 2d 469 (1993), is not required to be applied by the trial court when considering the admissibility of testimony of an expert, but it may be helpful in complex cases to use one or more of the relevant *Daubert* "considerations" when assessing the reliability of the expert testimony. *Leaf v. Goodyear Tire and Rubber Co.,* 590 N.W.2d 525, 533 (Iowa 1999). The admission of such testimony rests within the sound discretion of the district court. *Tappe v. Iowa Methodist Med. Ctr.,* 477 N.W.2d 396, 402 (Iowa 1991). Iowa Rule of Evidence 5.702 provides:

> If scientific, technical, or other specialized knowledge will assist the trier of fact to understand the evidence or to determine a fact in issue, a witness qualified as an expert by knowledge, skill, experience, training or education may testify thereto in the form of an opinion or otherwise.

The proper test for admission of expert testimony in Iowa is whether the evidence is relevant; whether it is in the form of scientific, technical, or other specialized knowledge that will assist the trier of fact; the witness must be qualified as an expert by knowledge, skill, experience, training, or education; and in addition, any potential for an exaggerated effect of the proffered evidence should be considered. *Leaf,* 590 N.W.2d at 533.

Sufficient testimony was elicited for the trial court to determine that the reliability of the documentation in the USDA Redbook was relevant. The witness had specialized knowledge of the compilation of the data, and such specialized knowledge was in the form which could assist the jury in weighing the evidence presented. The trial court did not abuse its discretion in the admission of evidence from this witness.

D. The trial court limited the testimony of Dr. David Reid, listed as an expert for Interstate, to the report provided to Martins that he had prepared for them when Martins engaged him prior to trial. Interstate had failed to provide Martins with an answer pursuant to Iowa Rule of Civil Procedure 1.508 in response to interrogatories requesting opinions of this expert. Interstate asserts the trial court committed error by limiting the testimony of Dr. Reid. Although identified as a brief point, Interstate presents no argument in support of its contention on this issue.

No proffer of the additional opinions Dr. Reid would have presented was elicited from the witness. It cannot be determined from the record what prejudice, if any, occurred from the limitation of testimony from this witness.

No abuse of discretion, if any, on the part of the trial judge can be established from this record.

E. Dr. Shoemaker, an expert for Interstate, testified over objection of relevancy, that Martins' alleged violations of the National Electric Code may have contributed to the stray voltage on the farm. After substantial testimony from this witness, the court reconsidered its ruling, struck the evidence of compliance or noncompliance with the National Electric Code, and instructed the jury to disregard it. In the final instructions submitted to the jury the court restated the curative instruction. Interstate contends the court erred in refusing to admit the testimony and erred in repeating its curative instruction in the final instructions.

It is apparent the trial court, on reflection, concluded the testimony of Shoemaker concerning National Electric Code violations was an attempt to introduce the element of comparative fault into the case and properly corrected his ruling. It is noted that no motion for mistrial was made by Interstate at that time.

Interstate complains that the repetition of a curative instruction in the final instructions directing the jury not to consider evidence of compliance or noncompliance with the National Electric Code because it was stricken from the record unduly emphasized this issue to the prejudice of Interstate. Correct statements of the law, if repeated to the point of undue emphasis, may constitute reversible error. *Clinton Land Co.* v. *M/S Assocs., Inc.,* 340 N.W.2d 232, 234 (Iowa 1983). In this case, the repetition of the curative instruction was a reminder to the jury to disregard certain evidence and not a restatement of a legal principle. No

prejudicial error was created by the court by this procedure.

Statute of limitations. The nature of the action determines the proper statute of limitations. *Venard v. Winter,* 524 N.W.2d 163,165 (Iowa 1994). Iowa Code section 614.1 provides:

> Actions may be brought within the times herein limited, respectively, after their causes accrue, and not afterwards except when otherwise specially declared:
>
> . . . .
>
> 4. . . . [T]hose brought for injuries to property . . . within five years. . . .

The evidence reflects that stray voltage was a continuing and recurring event. Where the wrongful act is continuous or repeated, so that separate and successive actions for damages arise, the statute of limitations runs as to these latter actions at the date of their accrual, not from the date of the first wrong in the series. *Hegg v. Hawkeye Tri-County REC,* 512 N.W.2d 558, 559 (Iowa 1994); *Anderson v. Yearous,* 249 N.W.2d 855, 860 (Iowa 1977); *Earl v. Clark,* 219 N.W.2d 487, 491 (Iowa 1974). The undisputed record reflects that Martins did not become aware the stray voltage in the barn was affecting their cattle until August of 1992, although there is reason to conclude the stray voltage may have been affecting the herd since 1989. Iowa courts have followed the principle that a cause of action based on negligence does not accrue until the plaintiff has in fact discovered that he or she has suffered injury or by the exercise of reasonable diligence should have discovered it. *Lebeau v. Dimig,* 446 N.W.2d 800, 801 (Iowa 1989); *Franzen v. Deere & Co.,* 377 N.W.2d 660, 662 (Iowa 1985).

The same rule should be applicable in nuisance cases. The injuries were recurring and successive recovery is limited to those actions accruing during the statutory period. In this case the period is five years preceding the inception of the current action for damages. *Hegg,* 512 N.W.2d at 560. The trial court correctly instructed the jury concerning this issue.

Instructions. Interstate contends the trial court failed to properly instruct on the elements of nuisance. Instruction fifteen correctly defined private nuisance. It defines the interest in land which is required, the elements of unreasonable invasion necessary to consider, the definition of substantial cause, and the measure of damages. *See Weinhold,* 555 N.W.2d at 465-66; *Bates,* 261 Iowa at 703-04, 154 N.W.2d at 857. The instruction of the trial court embodies the applicable factual considerations the jury must consider in determining whether liability lies, and if so, the manner of assessing damages. Interstate further contends the instructions were not balanced but were slanted in favor of Martins. We follow well-established standards in our review of the propriety of the submission of the instructions to the jury. *See Young v. Gregg,* 480 N.W.2d 75, 80 (Iowa 1992). We find no prejudicial error in the instructions given or in the refusal of instructions proposed by Interstate. The instructions given thoroughly and fully present the issues so that the jury had a proper understanding of the law applicable to determination of the verdict. We find no merit in the contention that the instructions were unfairly biased in favor of Martins.

Damages. Interstate complains that the trial court improperly instructed the jury on the proper measure of damages contending that it is only the interest in real

property that is compensable. In *Weinholt* [sic] *v. Wolff,* 555 N.W.2d at 465, the elements of damage in permanent nuisance cases was defined. Our supreme court stated:

> When the nuisance is permanent, the proper measure of damages is the diminution in the market value of the property. 58 Am. Jur. 2d *Nuisances* § 289 (1989); *Mel Foster Co. Props.,* 427 N.W.2d at 175. Where the nuisance is permanent, the landowner may also recover such other special damages the landowner may prove. 58 Am. Jur. 2d *Nuisances,* § 293 (1989). The rule is that
>
> > in addition to depreciation in the market . . . value of the realty, the plaintiff may recover the damages he himself suffers from the deprivation of the comfortable enjoyment of his property, and the inconvenience and discomfort suffered by himself and his family, or other affected persons.
> >
> > The personal inconvenience, annoyance, and discomfort to a property owner or occupant caused by a nuisance is a separate and distinct element of damage, and thus, damages for personal inconvenience, annoyance, and discomfort caused by the existence of a nuisance are separately and independently recoverable in a nuisance action in addition to, or separate from, damages suffered in respect of the market value of the premises, or injuries to or destruction of buildings and crops resulting from a permanent nuisance. . . .

The trial court has properly incorporated these elements of damages in the instructions presented to the jury.

The trial court is affirmed.

AFFIRMED.

IN THE SUPREME COURT OF IOWA

No.00-791

Clayton County No. LACV005049

ORDER

(Filed Jul. 03, 2002)

DANIEL MARTINS and
COLEEN MARTINS,
Plaintiffs-Appellees,

vs.

INTERSTATE POWER COMPANY,
Defendant-Appellant.

This matter comes before the court on a motion for leave to file amicus curiae brief, filed by the Iowa Utility Association, the Iowa Association of Municipal Utilities, and the Iowa Association of Electric Cooperatives. Plaintiffs have filed a resistance.

After consideration, the court grants the motion. The amicus curiae shall serve and file a single amicus brief not exceeding twenty-five pages in length within twenty-one days of the entry of this order. Plaintiffs shall then have fourteen days to respond. Plaintiffs response shall not exceed ten pages in length. The request of amicus curiae to be heard in oral argument is denied.

Dated this 3rd day of July, 2002.

THE SUPREME COURT OF IOWA

By /s/ Louis A. Lavorato
Louis A. Lavorato, Chief Justice

IN THE IOWA DISTRICT COURT
FOR CLAYTON COUNTY

DANIEL & COLEEN MARTINS, Plaintiffs, Vs. INTERSTATE POWER COMPANY, Defendant.	Case No. LACV005049 JUDGMENT (Filed Apr. 11, 2000)

The jury having returned its verdict consistent herewith,

IT IS ORDERED ADJUDGED AND DECREED that judgment is entered in favor of plaintiffs, Daniel Martins and Coleen Martins, and against defendant, Interstate Power Company, in the amount of $700,000.00 plus interest at the rate of 8.197 percent from November 27, 1996, and for the court costs of this action pursuant to Chapter 625 of the Iowa Code.

Copies of this Order shall be provided to counsel.

Signed on April 10, 2000.

BY THE COURT:

/s/ James L. Beeghly
JAMES L. BEEGHLY, JUDGE

IN THE SUPREME COURT OF IOWA

~~No.~~ 121 / 00-0791

ORDER

DANIEL MARTINS and COLEEN MARTINS,

AppelleeS,

(Filed Nov. 7, 2002)

v.

INTERSTATE POWER COMPANY,

Appellant.

After consideration by the court, the Petition for Rehearing in the above-captioned case is hereby overruled and denied.

Dated this 7th day of November 2002.

THE SUPREME COURT
OF IOWA

By: /s/ Louis A. Lavorato
Louis A. Lavorato,
Chief Justice

* * *

IN THE SUPREME COURT OF IOWA

DANIEL MARTINS and COLEEN MARTINS,	)	
APPELLEE,	)	SUPREME COURT NO. 00-0791
vs.	)	
INTERSTATE POWER COMPANY,	)	Clayton County No. LACV005049
APPELLANT.	)	

APPEAL FROM THE DISTRICT COURT
FOR CLAYTON COUNTY
THE HONORABLE JAMES BEEGHLY

(Filed Oct. 23, 2002)

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ATTORNEYS FOR APPELLEE

PETITION FOR REHEARING
IN THE SUPREME COURT

CERTIFICATE OF FILING

I hereby certify that on the 22nd day of October, 2002, I, the undersigned party or person acting in his/her behalf, did file the within Petition for Rehearing in the Supreme Court by mailing eighteen (18) copies thereof to:

Clerk of Supreme Court
State Capitol Building
Des Moines, IA 50319

by depositing the same in the United States Mail, with sufficient postage affixed thereon.

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PROOF OF SERVICE

I hereby certify that on the 22nd day of October, 2002, I, the undersigned party or person acting in his/her behalf did serve the within Petition for Rehearing in the Supreme Court thereof on all counsel for Plaintiff/Appellee by mailing two (2) copy thereof to the addresses as disclosed in the pleadings as follows:

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in full compliance with the provisions of the Iowa Rules of Appellate Procedure.

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Interstate Power Company, Defendant/Appellant in this cause, believing that the Court misapprehended significant points of fact, law, and the Constitutional implications, respectfully requests the Supreme Court of Iowa, pursuant to IRAP 6.27, to reconsider the Opinion filed in this cause on October 9, 2002.

Violation of Separation of Powers: According to the Iowa Constitution the powers of the government of Iowa are be divided into three separate departments – the legislative, the executive, and the judicial, and no person charged with the exercise of powers properly belonging to one of these departments may exercise any function appertaining to the others, except in cases expressly directed or permitted. The Legislature is charged with enacting laws regulating electrical utilities. *Code of Iowa*,

Chapter 474; *Iowa City Community School Dist. v. Iowa City Educ. Ass'n*, 343 N.W.2d 139 (Iowa 1983.) In its Opinion, this Court notes that "unlike South Dakota, Iowa has no statute exempting electric utilities from nuisance claims." But Iowa does have statutes and regulations governing the transmission and delivery of electricity. The Martins' challenge of unreasonableness (the requirement for nuisance, the only claim advanced) in this case was to those regulations and the methods approved by them. By allowing the Martins to proceed and succeed in their challenge, the Court has impliedly found that the methods approved by the Legislature are in fact unreasonable. The Court says, at page 10, that

> "The argument here, of course, is that we as a court should not wait for legislative action and should on our own adopt a similar stance in the name of public policy."

Interstate regrets that its argument was so unclear as to lead the Court to that misapprehension. Interstate's argument is in fact the reverse; that in refusing to hold that the method of delivery of electrical service chosen and adopted by the Legislature is and *must be per se reasonable*, and can never provide the basis for a finding of an "unreasonable interference" as it was in this case, the Supreme Court has adopted a position and policy contrary to the position of the Legislature, abrogating legislative regulations. Though the Legislature did not specifically say utilities would be exempted from nuisance liability for using the delivery systems adopted by it, by promulgating the use of the Wye distribution system, the Legislature reflected an intent to exempt the methods it deemed reasonable. In interpreting a statute, what the Legislature

did not say may be just as important as what the Legislature did say. Legislative intent is expressed by omission as well as by inclusion. *Eaton v. Iowa Employment Appeal Bd.*, 602 N.W.2d 553 (Iowa 1999.) While the Supreme Court is not authorized to read in something which does not come within the reasonable meaning of a Legislative enactment, it is presumed that the Court will give effect to all which reasonably does. *See, Iowa Comprehensive Petroleum Underground Storage Tank Fund Bd v. Mobil Oil Corp.*, 606 N.W.2d 359 (Iowa 2000.) (In determining Legislative intent, this Court is to consider the objects sought to be accomplished by the Legislature, the purpose served by the statute, the underlying policies, the remedies, and the consequences of the various interpretations.) The Legislature has given the Iowa Utilities Commission the authority to determine the best, safest, and most beneficial methods for the delivery of electrical service, and Interstate respectfully submits that this Court has failed to appreciate the full consequences of the interpretation resulting from permitting those methods to be deemed a nuisance with no finding that the nuisance is the result of negligence. In *Fleming v. Richardson*, 237 Iowa 808, 24 N.W.2d 280 (1946) this Court said,

> "The Iowa State Commerce Commission is a body established by legislative act to have general supervision of the railroads and other common carriers operating in the state. It has duties with respect to the enforcement of legislation applying particularly to transportation as conducted by these carriers. . . . the Legislature, acting within its sphere, is presumed to know the needs of the people of the state. . . . The Legislature may require an adequate headlight and whether the carrier's practice is properly conducive to safety, or a new method affording greater protection

> should be substituted, is a matter for the legislative judgment . . . the Legislature may select the means which it deems to be appropriate to the end to be achieved."

In the same case, citing a United States Supreme Court case, this Court said

> "When the subject lies within the police power of the state, debatable questions as to reasonableness are not for the courts but for the Legislature, which is entitled to form its own judgment, and its action within the range of discretion, cannot be set aside because compliance is burdensome." *Id.* at 289.

Yet, if this Court refuses to reconsider and reverse the Opinion rendered by it in this cause, the Court has in fact decided the question of the reasonableness of the methods prescribed by the Legislature and found them to be unreasonable. Had the Legislature intended to give that power to this Court, it could not. The Legislature is empowered to create a public utilities commission and to delegate to it legislative powers, but no such delegation can be made to the courts, even by express legislative enactment. *Iowa-Illinois Gas & Elec. Co. v. City of Fort Dodge*, 248 Iowa 1201, 85 N.W.2d 28 (1957.) This Court affords "considerable deference to the agency's expertise, especially when the decision involves the highly technical area of public utility regulations," and defers to the agency's decisions that fall within the "zone of reasonableness." *S.E. Iowa Co-op Elec. Ass'n v. Iowa Utilities Bd.*, 633 N.W.2d 814 (Iowa 2001.) That every utility in this country except for "part of California, maybe Florida and one city in Michigan" utilizes the system adopted by the Iowa Utilities Commission is abundant evidence that its use is within the zone of

reasonableness, yet, that use has been denied the deference normally accorded. In *A&S, Inc. v. Iowa State Highway Commission*, 253 Iowa 1377, 116 N.W.2d 496 (1962) this Court said

> "It is not the privilege, duty nor within the proper function of judges or courts to pass upon, approve or disapprove the location, design, plans or specifications of public highways. Jurisdiction and control over the primary highways are vested in and imposed on the state highway commission." *Id.* at 500.

Neither is it the privilege, duty, nor within the proper function of judges or courts to pass upon, approve or disapprove designs and specifications regarding electrical systems, but by permitting this judgment to stand, that is what the Court has done. In *Mohr v. Midas Realty Corporation*, 431 N.W.2d 380 (Iowa 1988) in considering whether to extend the law of nuisance, this Court wrote,

> "As aptly noted by the trial court, extending the law of nuisance to encompass obstruction of view caused by lawful construction of a neighboring building would unduly restrict a landowner's right to the free use of property, interfere with established zoning ordinances, and result in a flood of litigation. Because every new construction project is bound to block someone's view of something, every landowner would be open to a claim of nuisance. If the first property owner on the block were given an enforceable right to unobstructed view over adjoining property, that person would fix the setback line for future neighbors, no matter what zoning ordinances provide. The practical implication of such a right would be the need of every "servient" owner to obtain a waiver of the easement of view created

> in the "dominant" land owner. The uncertainty of whether an adjoining owner might come forward with a claim of nuisance to challenge an otherwise lawfully constructed building would be a latent defect in every land transaction. . . . " *Id.* at 383.

This Court has created a particular cause of action for Plaintiffs such as the Martins which has not yet been allowed in any case or jurisdiction cited by the Court or either counsel. A Justice once wrote in a partial dissent "In this age when a solution is sought at law for almost every human problem, we must be vigilant to prevent the court system from being used to inflict injury rather than to obtain redress for legitimate wrongs." But that is what will occur as a result of this Opinion. In *Fuller v. Buhrow*, 292 N.W.2d 672 (Iowa 1980) in concurring specially, Justice Harris wrote "In discharging our law-giving function this Court has an obvious duty to adopt the principles which best serve the public interest . . . the public has an overriding need for at least a minimum of predictability and certainty in the law . . . " The principles best serving the public interest in the delivery of electrical services are embodied in the Code and regulations, and if this Opinion is not reversed, those principles provide no certainty or predictability other than the certain prediction that this already over-burdened judicial system will be inundated with allegations of nuisance and that society will ultimately bear the costs. To construe the common law in such a way as to permit the maintenance of a claim for nuisance solely because the defendant utility uses a distribution system approved by the Legislature is to abrogate the laws which have been enacted by the Legislature and the Iowa Utilities Commission, and to replace them with new common law. The branches of government

need not be entirely distinct, but have a degree of overlapping responsibility, a duty of interdependence as well as independence, the absence of which precludes the establishment of a state capable of governing itself effectively. *Channon v. United Parcel Service, Inc.*, 629 N.W.2d 835 (Iowa 2001.) That degree of interdependence is not evidenced in this Court's Opinion as it now stands. "Precedent speaks for the past; policy for the present and the future. The goal which we seek is a blend which takes into account in due proportion the wisdom of the past and the needs of the present. Two agencies of government are responsible for the proper blend." *Wright v. Daniels*, 164 N.W.2d 180 (Iowa 1969.) The proper blend has not been reached and will not if this Court does not reconsider and reverse its present Opinion.

Taking Without Compensation and Impairment of Contract:

> "The obligation of a contract is the duty of performance according to its terms, the means of enforcement being a part of the obligations, which the states cannot by legislation impair. . . . This obligation, this duty of performance, this binding power which compels performance, this law of the contract, the Constitution declares shall not be impaired. . . . Impair means to make worse, to diminish in quantify, value, excellence, or strength, to lessen in power, to weaken, to enfeeble, to deteriorate . . . " *Leach v. Treynor Sav. Bank*, 203 Iowa 988, 213 N.W. 517 (1927.)

The undisputed record evidence is that Interstate and the Martins' predecessor in interest entered a contractual relationship, for which Interstate gave, and the Martins'

predecessor received, compensation. That contract provided Interstate with an easement to transmit "electric or other power *on, through, over and across*" all of the Martins' property. It can neither be ignored nor disputed that *the Martins' claim in this case is about the transmission of electric power on, through over and across* the Martins' farm.

(Court's Opinion, page 5,

"In order to understand stray voltage or neutral-to-earth voltage, one must first understand the neutral-grounded network. All electricity leaving an electrical substation must return to that substation in order to complete a circuit . . . The neutral-grounded network provides the returning current two choices. Either it can return via the neutral line [i.e. over and across] . . . or it can return through the ground. [i.e. on, through] These two pathways comprise the grounded-neutral network.")

Interstate's easement reflects the undisputed, inherent nature of electricity. When people like the Martins' desire to use electricity and use it for their purposes and gain, they accept the nature of electricity, and are compensated for accepting that and for giving electricity and the electrical deliverer an easement. The case at bar is not a *casus omissus*, since it was a situation provided for by contract and prior caselaw. But despite having taken Judicial Notice of the contract/easement, neither court enforced or honored it. *See, Stoner McCray System v. Des Moines*, 247 Iowa 1313, 78 N.W.2d 843 (1956). In failing to give full force and effect to that contract/easement, and in failing to give that contract/easement the result provided for under prior caselaw, the Court deprived Interstate of a vested

property interest, and a governmental taking occurred without compensation.

Deprivation of Due Process: The U.S. Constitution prohibits any state from depriving any person of property without due process of law, and the Iowa Constitution provides that "no person shall be deprived of . . . property without due process of law." The Judiciary and the Legislature are branches of the government of the State of Iowa. The Legislature regulates the construction and safety of electrical delivery systems. Liability in this case was assessed against Interstate for one reason, the use of the distribution system approved by the Legislature, the Utilities Board and the Code of Iowa. Interstate's lines were in complete compliance with Code requirements, as prescribed by one branch of this state's government. Yet, according to the Opinion of another branch of this same government, that compliance is held to be unreasonable, since, by definition and law, it can only be a nuisance if it is unreasonable. One branch of Iowa's state government tells this corporate citizen what it must do. *Elk Run Tel. Co. v. General Tel. Co of Iowa*, 160 N.W.2d 311 (Iowa 1968.) And after this corporate citizen does what it has been compelled to do, another branch of the same government assesses liability for doing it. *Martins v. Interstate Power Company*, 121/00-0791 (Iowa 2002).The test of whether due process has been violated is whether the challenged practice offends a principle of justice so rooted in the traditions and conscience of the people as to be ranked as fundamental. *Auxier v. Woodward Sate [sic] Hospital-School*, 266 N.W.2d 139 (Iowa 1978.) What could be more offensive to the principles of justice rooted in our American traditions and conscience than for citizens to be caught between two branches of government, subjecting them to

catastrophic consequences regardless of which branch of government they choose to accept as authoritative? Interstate's fundamental rights have been infringed upon with absolutely no governmental purpose or interest advanced. *See, State v. Klawonn*, 609 N.W.2d 515 (Iowa 2000.) In reliance on the Code of Iowa and the easements held by it, Interstate expended large sums of money constructing systems for delivery of electrical service in accord with Code requirements promulgated by the Legislature and the Iowa Utilities Commission. Interstate therefore has a vested property right. Whether the property right springs from contract or tort, government may not take it away, and the governmental destruction of a vested right is in violation of the due process clause. *16A Am.Jur.2d, Constitutional Law*, 672. But if this Court's Opinion is not reconsidered and reversed, it destroys Interstate's vested property rights, and without due process because all expenditures, constructions and actions for which Interstate is now found liable were made under and in complete accord with the law of Iowa. Interstate is entitled to the Constitutional protections afforded every other citizen against such governmental conduct. "The right to operate a legitimate business is one which the state may regulate, but may not prohibit or unreasonably restrict." *Central States Theatre Corp v. Sar*, 245 Iowa 1254, 66 N.W.2d 450, 453 (1954.) In the operation of its business Interstate is now left to either ignore the dictates of the Legislature or ignore this Court's ruling. How could a legitimate business be more unreasonably restricted in its operation than to be caught between the decidedly differing dictates and decisions of two independently operating branches of government? The essential requirement of due process is one of fundamental fairness. *Kirk v. Iowa Dist. Court for Jefferson County*, 508 N.W.2d 105 (Iowa Ct. App. 1993.)

Can this Court deny that there is a fundamental unfairness for a citizen such as Interstate to face the certain barrage of nuisance claims premised solely on the combination of the inherent nature of electricity and compliance with legislative fiat? Due process is not a technical concept with fixed content unrelated to time, place and circumstances; but flexible, calling for such protections as the situation demands. *State v. Izzolena*, 609 N.W.2d 541 (Iowa 2000.) It is respectfully submitted that due process under the circumstances and situation presented by this cause requires that this Court reconsider and reverse its Opinion.

Denial of Equal Protection: Equal protection requires persons under like circumstances to be given equal protection in the enjoyment of property, the endorsement of contracts and the prevention and redress of wrongs. *Brown Enterprises, Inc. v. Fulton*, 192 N.W.2d 773 (Iowa 1972.) This Court has specifically held that an easement is "a right to maintain a nuisance," entitling its owner to do acts which otherwise would constitute a nuisance. *Bormann v. Board of Sup'rs*, 584 N.W.2d 309, 315 (Iowa 1998.) Interstate has an undisputed perpetual easement, of which the trial court took Judicial Notice, to transmit *"electric or other power on, through, over and across" all* of the Martins' property, not just a part or a strip of the property, but *by specific description* contained within the easement itself, *all* of it. This Court affirmed the decision that Interstate was a nuisance, despite Interstate's absolute defense under the common law as so very recently propounded by this Court, with no justification in fact or law to deny Interstate the same protection afforded by that defense to any other citizen of the state of Iowa. The Court may think the Martins' predecessors made a bad

deal, or may be uncomfortable with the result. But according to the Constitution and rights guaranteed thereunder, neither the trial court nor this Court is free to ignore the easement, nor to deny Interstate the same protection to which every other easement holder in Iowa is entitled. If the Court does so, Interstate is denied the equal protection of law, and the Court has nullified every utility easement ever granted in this state, opening every utility to unbridled claims of nuisance.

WHEREFORE, it is respectfully requested the Opinion of this Court be reconsidered and reversed.

Respectfully submitted,

INTERSTATE POWER
COMPANY, APPELLANT

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By: /s/ Angela C. Simon
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IN THE SUPREME COURT OF IOWA
No. 1-517/00-0791
Filed April 10, 2002

DANIEL MARTINS and COLEEN MARTINS, PLAINTIFFS/APPELLEE, vs. INTERSTATE POWER COMPANY, DEFENDANT/APPELLANT.	)	Clayton County No. LACV005049

APPEAL FROM THE DISTRICT COURT
FOR CLAYTON COUNTY
THE HONORABLE JAMES BEEGHLY

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CERTIFICATE OF FILING

I hereby certify that on the 23rd day of July, 2002, I, the undersigned did file the within Brief of Amicus Curiae in Support of the Application for Further Review on the Supreme Court by mailing eighteen (18) copies thereof to:

Clerk of Supreme Court
State Capitol Building
Des Moines, IA 50319

by depositing the same in the United States Mail, with sufficient postage affixed thereon.

IOWA UTILITY
ASSOCIATION,
IOWA ASSOCIATION OF
MUNICIPAL UTILITIES
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AMICUS CURIAE

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I. THE COURT OF APPEALS IMPROPERLY IMPOSED LIABILITY ON INTERSTATE WITHOUT REQUIRING A SHOWING OF FAULT 6

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STATEMENT OF ISSUES

I. THE COURT OF APPEALS IMPROPERLY IMPOSED LIABILITY ON INTERSTATE WITHOUT REQUIRING A SHOWING OF FAULT

Blackman v. Iowa Union Electric Company, 234 Iowa 859, 862, 14 N.W.2d 721 (1944)

Hawk v. Interstate Power Company, 521 N.W.2d 762 (Iowa Appeals 1994)

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Northwestern National Insurance Company v. Raid Quarries Corp., 249 N.W.2d 640, 645 (Iowa 1977)

Otte v. Dayton Power and Light Company, 37 Ohio St. 3d 33, 523 N.E. 2d 835, 838-39 (1988)

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II. EVIDENCE OF CAUSATION WAS IMPROPERLY EXCLUDED BY THE TRIAL COURT

Kreiner v. Turkey Valley Community School Dist., 212 N.W.2d 526 (Iowa 1973) *Osborn v. Massey-Ferguson. Inc.*, 290 N.W.2d 893, 901 (Iowa 1980)

III. EVIDENCE CONCERNING CONTRIBUTORY FAULT OF THE PLAINTIFF SHOULD BE ADMISSIBLE IN A NUISANCE ACTION

Iowa Code Chapter 668 (2001)

STATEMENT OF THE CASE

Amicus Curiae respectfully adopt and incorporate by reference the statement of the case contained in Interstate Power Company's Initial Brief.

IDENTIFICATION AND STATEMENT OF INTEREST OF AMICUS CURIAE

The Amicus Curiae are all associations whose members are comprised of utilities operating within the State of Iowa, and all have a direct interest in this Court's decisions concerning the standard of care applicable to electrical utilities. The Iowa Association of Electric Cooperatives is a trade association representing 38 distribution cooperatives that provide electric service at retail to member consumers in their assigned service areas in the state of Iowa and five generation and transmission cooperatives that provide wholesale electric distribution service to the distribution cooperative members in the State of Iowa.[1] The Iowa Association of Municipal Utilities

[1] The members of the Iowa Association of Electric Cooperatives are: Access Energy Cooperative, Allamakee-Clayton Electric Cooperative, Amana Society Service Company, Basin Electric Power Cooperative, Boone Valley Electric Cooperative, Butler County REC, Calhoun County Electric Association, Central Iowa Power Cooperative, Chariton Valley Electric Cooperative, Clarke Electric Cooperative, Consumers Energy, Corn Belt Power Cooperative, Dairyland Power Cooperative,

(Continued on following page)

is a non-profit corporation representing the common interests of more than 550 municipal electric, gas, water and telecommunications utilities in Iowa.[2] The Iowa

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East-Central Iowa REC, Eastern Iowa REC, Farmers Electric Cooperative, Greenfield Farmers Electric Cooperative, Kalona, Franklin REC, Glidden REC, Grundy County REC, Guthrie County REC, Harrison County REC, Hawkeye Tri-County REC, Heartland Power Cooperative, Humboldt County REC, Iowa Lakes Electric Cooperative, Linn County REC, Lyon REC, Maquoketa Valley Electric Cooperative, Midland Power Cooperative, Nishnabotna Valley REC, North West REC, Northeast Missouri Electric Power Cooperative, Northwest Iowa Power Cooperative, Osceola Electric Cooperative, Pella Cooperative Electric Association, Pleasant Hill Community Lines, Prairie Energy Cooperative, Rideta Electric Cooperative, Sac County REC, Southern Iowa Electric Cooperative, Southwest Iowa Service Cooperative, T.I.P. REC, Western Iowa Power Cooperative, Woodbury County REC.

[2] The Municipal utilities in Iowa operating electric systems and potentially impacted by this case include Afton, Akron, Algona, Alla, Ails Vista, Alton, Ames, Anita, Anthon, Aplington, Atlantic, Auburn, Aurelia, Bancroft, Bellevue, Bloomfield, Breda, Brooklyn, Buffalo, Burt, Callender, Carlisle, Cascade, Cedar Falls, Coggon, Coon Rapids, Coming, Carwith, Danville, Dayton, Denison, Denver, Dike, Durant, Dysart, Earlville, Eldridge, Ellsworth, Estherville, Fairbank, Farnhamville, Fonda, Fontanelle, Forest City, Fredericksburg, Glidden, Gowrie, Graettinger, Grafton, Grand Junction, Greenfield, Grundy Center, Guttenberg, Harlan, Hartley, Hawarden, Hinton, Hopkinton, Hudson, Independence, Indianola, Keosauqua, Kimballton, La Porte City, Lake Mills, Lake Park, Lake View, Lamoni, Larchwood, Laurens, Lawler, Lehigh, Leriox, Livermore, Long Grove, Manilla, Manning, Mapleton, Maquoketa, Marathon, McGregor, Milford, Montezuma, Mt Pleasant, Muscatine, Neola, New Hampton, New London, Ogden, Onawa, Orange City, Orient, Osage, Panora, Paton, Paullina, Pella, Pocahontas, Preston, Primghar, Readlyn, Remsen, Renwick, Rock Rapids, Rockford, Sabula, Sanborn, Sergeant Bluff, Shelby, Sibley, Sioux Center, Spencer, Stanhope, Stanton, State Center, Story City, Stratford, Strawberry Point, Stuart, Sumner, Tennant, Tipton, Traer, Villisca, Vinton, Wall Lake, Waverly, Webster City, West Bend, West Liberty, West Point Utility System, Westfield, Whittemore, Wilton, Winterset, Woodbine, Woolstock

Utility Association is a trade Association representing the interests of certain investor-owned utilities in Iowa.[3]

This case involves allegations regarding an electrical phenomenon commonly known as "stray voltage," which is a condition inherent in the delivery of electrical service. The facts of this case indicate the Plaintiffs/Appellee object to the use of a multi-grounded Wye distribution system, which is a code-compliant system most commonly used by electric utilities. The Appellate Court's decision imposes liability on the Defendant/Appellant for use of this Code-Compliant system and has created a new and potentially devastating standard of care applicable to electric utilities. The Appellate Court's decision opens the door for all users of electricity to seek large judgments against utilities based on complaints of a condition inherent in the delivery of electricity and without the necessity of showing negligence, fault or wrong-doing of any kind on the part of the utility. The decision can also be read to imply that the actions of the Plaintiff in a "nuisance" action, which may have been the cause, or at the very least a contributory cause to the harmful interference (stray voltage in the instant case), cannot be considered by the Court. Finally, the decision can be read to create broad, new liability for electrical utilities under the rubric of "nuisance," which will have devastating consequences on all utilities operating in Iowa and on their customers.

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[3] The members of the Iowa Utility Association are:
Alliant Energy, Aquila, Inc., MidAmerican Energy Company and United Cities Gas Company

The Amicus Curiae, as representing nearly all electric utility providers in the State of Iowa, clearly have a significant interest in the outcome of this case and they collectively applaud the Court's recognition of said interest by its Order of July 3, 2002, allowing the submission of a Brief by the Amicus Curiae. This Brief is submitted in response to said Order.

SUMMARY OF ARGUMENT

This cause of action arises out of a claim of nuisance brought by the Plaintiffs against Interstate Power Company. The alleged nuisance was the existence of "stray voltage," an electrical phenomenon inherent in the delivery of electric service. The Court of Appeals held that a showing of negligence on the part of the utility is not vital to the establishment of an action based on nuisance. (Order at p.5). The Court went on to state that "there appears to be no reasonable basis for carving out a special exemption for electric utilities from the law of nuisance without negligence." However, the Amicus Curiae assert an appropriate basis for an exception not only exists, but has been recognized by this Court previously and by the Iowa Legislature. The Court of Appeals also found that the provisions of Iowa Code Chapter 668 (Comparative Fault) do not apply in this case. In so holding, the Court of Appeals attempts to draw a distinction without a difference between its application of the nuisance cause of action and strict liability. It is undisputed that comparative fault principles apply to strict liability actions; yet, the Court of Appeals holds that nuisance is not strict liability. However, under the given circumstances, the two are the same, irrespective of their different names.

The Standards set by the Court of Appeals comprise new standards not heretofore imposed on the electric utility industry. The implications of the decision of the Court of Appeals could be devastating to the industry. The industry is heavily regulated with many standards set by regulatory bodies. It has long been presumed that compliance with these standards, together with reasonable due care, would allow the utility to avoid liability. The Court of Appeal's decision sets a new standard; one that the utility industry cannot reasonably bear. This Court should reverse the decision of the Court of Appeals and restore confidence in the system of utility regulation in place today.

ARGUMENT

I. THE COURT OF APPEALS IMPROPERLY IMPOSED LIABILITY ON INTERSTATE WITHOUT REQUIRING A SHOWING OF FAULT.

As noted by the Court of Appeals, the Plaintiffs in the underlying cause are seeking damages from Interstate caused by stray voltage. (Order pg. 2). Stray voltage is a natural, low voltage bi-product of the transmission of electric power. A general discussion of the source and concept of stray voltage is found in this Court's decision in *Schlader v. Interstate Power Company*, 591 N.W.2d 10 (Iowa 1999). As noted by the Court, the Stray Voltage issue has been addressed by many courts; the concept is not new. *Id.* at p. 12.

Stray voltage has been held to be "a normal, natural condition which is common to every power distribution system in the country." *Otte v. Dayton Power and Light Company*, 37 Ohio St. 3d 33, 523 N.E. 2d 835, 838-39

(1988). It is a "normal and natural condition, common to all power distribution systems." *Id.* at 839. It is one of the basic phenomena of electricity. "There's always going to be some". *See Kolpin v. Pioneer Power & Light Co., Inc.*, 453 N.W. 2d 214 (Wis. Ct. of App. 1990).

Given the nature of stray voltage and its inherent existence in connection with the operation of an electric system, the Court of Appeal's decision to affirm the District Court's ruling finding in favor of the Plaintiff, without requiring any demonstration of negligence, fault, or wrongdoing on the part of Interstate, is tantamount to imposing strict liability upon all electric utilities for stray voltage claims. The imposition of such liability is inconsistent with the court's prior ruling in *Schlader*, 591 N.W. 2d 10 (Iowa 1999). In the *Schlader* case, the Schladers urged the Court to adopt a rule of strict liability against power companies regarding stray voltage. *Id.* at pg. 12. This Court refused to do so holding as follows:

> Strict liability does not arise merely because a public utility is involved. *Northwestern National Insurance Company v. Raid Quarries Corp.*, 249 N.W.2d 640, 645 (Iowa 1977). (Gas Company not an insurer for injuries resulting from escape of gas). It seems apparent that we would astonish the legislature if we were to adopt strict liability regarding stray voltage. An Iowa statute, Iowa Code §489.16 (1966), formerly provided:
>
> > 'Injury to person or property. In case of injury to any person or property by any such transmission line, negligence will be presumed on the part of the person or corporation operating said line and causing said injury, but this presumption may be rebutted by proof.'

> The statute was repealed. 1986 Iowa Acts Chapter 1198, Section 1.
>
> **Repeal of the Statute weighs strongly against strict liability. We refuse to impose it.**" (emphasis added)

Schlader at pp. 12-13. The legislature's determination not to impose strict liability on utility companies is one of public policy. The Courts generally defer to the legislature in questions of public policy, as the legislature has considerable discretion in determining what constitutes the public health, safety, and welfare. *See, Hawk v. Interstate Power Company*, 521 N.W.2d 762 (Iowa Appeals 1994), citing *State v. Wahlert*, 379 N.W.2d 10, 14 (Iowa 1985) and *State v. Hartog*, 440 N.W.2d 852, 856 (Iowa 1989). This Court should again defer to the Legislature and refuse to impose strict liability against utilities, regardless of the theory under which the Plaintiffs seek to impose it.

This Court has previously recognized a general standard in nuisance actions as follows:

> "a person who creates or maintains a nuisance is liable for the resulting injury to others without regard to the degree of care or skill exercised by him to avoid such injury, and notwithstanding he exercised reasonable or ordinary care and skill, or even highest possible degree of care, or employed the most approved methods and appliances in the performance of the acts complained of" *Blackman v. Iowa Union Electric Company*, 234 Iowa 859, 862, 14 N.W.2d 721 (1944).

However, in the very same case where the general standard is noted, the Court also recognized an exception for utilities. The Court held that "a gas company is not liable as an insurer for injuries sustained as a result of the

escape of gas. It can only be held liable for its own negligence." *Id.*

The Court of Appeals attempts to distinguish between strict liability and its application of nuisance. The Court states that "the elements of the claim for nuisance and a claim under strict liability are not the same." (Opinion at pg. 9). The Court makes the following pronouncements concerning the two concepts:

Strict Liability

> "strict liability, generally speaking, imposes responsibility for damages proximately caused by the mere existence of the dangerous instrumentality or condition. It is liability without fault. A defendant is subject to liability for the conduct that amounts neither to negligence nor to any intentional tort." (Opinion at pg. 9).

Nuisance

Concerning nuisance, the Court states as follows:

> "if the wrongful condition exists, and the person charged therewith is responsible for its existence, he is liable for the resulting damages to others, though he may have used the highest possible degree of care to prevent or minimize the deleterious effects." (Opinion at pg. 8).

The Court further states that

> "nuisance is a condition, and not an act or failure to act on the part of the person responsible for the condition." (Opinion at pg. 8).

It is clear that the Court of Appeals has attempted to draw a distinction between nuisance and strict liability because it recognizes the legislature's specific rejection of strict

liability as it relates to utilities. However, the distinction is one without a difference. The Court's description of both claims impose liability without a showing of fault. While a negligence based nuisance claim could lie against a utility, one which is lacking in any demonstration of negligence, fault, or wrongdoing should not be allowed to stand as inconsistent with legislative directive and the present recognized standard of care imposed upon utilities.

In their resistance to the Application for Further Review, the Plaintiffs state that the "interrelationship between nuisance and strict liability has not been dealt with in an Iowa Court previously." (Resistance at p. 8). The Plaintiffs direct the Court to a decision of the Supreme Court of Wisconsin as allegedly persuasive authority that a nuisance cause of action could be submitted to the jury, even though the Wisconsin Court of Appeals had previously ruled that strict liability was inapplicable in a case for stray voltage damages. (Resistance at p. 8, citing, *Vogel v. Grant-Lafayett Electric Cooperative*, 201 Wis.2d 416, 548 N.W.2d 829 (1996) and *Kolpin v. Pioneer Power & Light*, 154 Wis.2d 487, 543 N.W.2d 214 (Ct. App. 1990)). However, the Plaintiffs fail to advise the Court that the Wisconsin Supreme Court in Vogel only approved submission of a negligence based nuisance claim, and specifically found that the principles of contributory negligence were applicable. *See Vogel*, 548 N.W.2d at p. 837. The approach taken by the Supreme Court of Wisconsin is the same approach the Amicus parties urge upon the Court.

It is worthy of note that electric utility companies are subject to significant regulatory oversight. Electric utilities are required to comply with the Iowa Electrical Safety Code as codified in 199 Iowa Administrative Code Chapter 25. The rules set forth in said Chapter are "intended to

promote safe and adequate service to the public, to provide standards for uniform and reasonable practices by utilities, and to establish a basis for determining the reasonableness of such demands as may be made by the public upon the utilities." 199 IAC 25.1(1). The Iowa Electrical Safety Code adopts by reference, with some modifications and qualifications, the National Electrical Safety Code (NESC) and other standards of accepted good practice. 199 IAC 25.2(5). The District Court and the Court of Appeals in the instant case, through their application of the nuisance doctrine, have created and applied a new strict liability standard on utilities which goes well beyond the standards heretofore adopted by the Iowa Legislature and the Iowa Utilities Board. The Court has found to be a "nuisance" what the entity charged with the responsibility of regulating utilities deems accepted good practice. The imposition of this liability against utilities could have a devastating impact on the utilities and jeopardize their viability. A utility will no longer be able to predict or foresee when liability will be imposed and when it will not. Public policy dictates a contrary result and the decision of the Court of Appeals should be reversed.

II. EVIDENCE OF CAUSATION WAS IMPROPERLY EXCLUDED BY THE TRIAL COURT.

As noted by the Court of Appeals, an expert for Interstate testified over objection of relevancy that the Plaintiffs "alleged violation of the National Electric Code may have contributed to the stray voltage problems that they were experiencing on the farm." (Opinion at Pg. 17). After substantial testimony from this witness, the Trial Court reconsidered its ruling, struck the evidence of compliance or noncompliance with the National Electric Code, and

instructed the jury to disregard it. (App. p. 667:13-670:18). In the final instructions submitted to the jury, the Trial Court restated the curative instruction. (App. p. 785).

The Court of Appeals states that "it is apparent the Trial Court, on reflection, concluded the testimony of Shoemaker [Interstate's expert witness] concerning National Electric Code violations was an attempt to introduce the element of comparative fault into the case and properly corrected his ruling." (Opinion at pg. 17). While the opinions regarding National Electric Code violations would in fact demonstrate comparative fault, said testimony also would be relevant to the issue of causation. The Plaintiff in a nuisance action must show the alleged nuisance was the "proximate cause" of the resultant damages. *Kreiner v. Turkey Valley Community School Dist.*, 212 N.W.2d 526 (Iowa 1973). Even under the "strict liability" type nuisance action endorsed by the Court of Appeals, causation would still be relevant. The injury or damages complained of must "result" from the alleged nuisance or condition. See, *Osborn v. Massey-Ferguson. Inc.*, 290 N.W.2d 893, 901 (Iowa 1980) (setting forth the elements of a strict liability claim). The testimony that the trial court instructed the jury to disregard (on two separate occasions) was clearly relevant to the issue of causation. Mr. Shoemaker testified that numerous National Electric code violations existed and that the same were the cause of the stray voltage problems experienced by the Plaintiffs. (App. p. 759-769).

In resistance to the Amicus Curiae application, the Plaintiffs contend that "any alleged violations of the National Electric Code, on the part of the Martins, was irrelevant because any contributory negligence is irrelevant." (Resistance p. 3). However, as previously noted, to

the extent the alleged violations of the National Electric Code impact the issue of causation, the same were relevant. It was reversible error for the trial court to exclude such evidence and, in particular, to emphasize the exclusion of said evidence by instructing the jury to disregard the same on two separate occasions.

If the Court is going to hold electric utilities to a new and different standard of care, which has not heretofore been imposed upon them, at the very least this Court should take great caution to preserve the utilities' right to present relevant evidence as to the cause of the damages for which the Plaintiff seeks compensation. To exclude such evidence merely compounds the initial error of imposing liability without fault in the first place.

III. EVIDENCE CONCERNING CONTRIBUTORY FAULT OF THE PLAINTIFF SHOULD BE ADMISSIBLE IN A NUISANCE ACTION.

Interstate requested that the Trial Court instruct the jury on the Plaintiffs comparative fault. (App. p. 772). The Trial Court declined to submit the issue of comparative fault and the Court of Appeals has affirmed said ruling. (Order at pgs. 7-8). While the Court of Appeals acknowledges that contributory negligence would be a valid defense in a nuisance case based on negligence, it holds that comparative fault should not be an issue in nuisance cases that are not based on negligence. (Order at pg. 8). First and foremost, the Amicus parties as set forth in Brief Point I above contend that nuisance actions based on anything other than negligence or fault should not lie against electric utility companies. However, if said actions are allowed to stand, comparative fault principles should apply.

Iowa's comparative fault provisions are found at Iowa Code Chapter 668 (2001). Iowa Code §668.1(1) defines fault as "one or more acts or omissions that are in any measure negligent or reckless toward the person or property of the actor or others, or *that subject a person to strict tort liability.*" (emphasis added). The Court of Appeals recognized that the Iowa legislature included strict liability in the provisions of Iowa Code Section 668.1, thereby making the principles of comparative fault applicable to such actions. However, the Court of Appeals incorrectly states that "nuisance is not strict liability". (Opinion at pg. 9).

While the Court of Appeals may be correct in drawing a distinction between negligence based nuisance actions and strict liability, the type of nuisance claim made against Interstate in the present action clearly constitutes strict liability. The court has imposed liability on Interstate based upon the mere existence of a condition (stray voltage) without any demonstration that Interstate acted negligently or recklessly towards the person or property of others. This is liability without fault as defined in Iowa Code §668.1(1), and therefore appropriate comparative fault principals should have been applied.

CONCLUSION

The service provided by electric utilities is designed to serve a public purpose. As such, utilities have been afforded the power of eminent domain by the Legislature. Iowa Code §478.15 (2001). The Legislature has assigned to the Iowa Utilities Board the responsibility and power to supervise the construction, operation and maintenance of electric lines. Iowa Code §478.18 (2001). The Board has, in

turn, set standards applicable to utilities. Compliance with these standards, and exercise of reasonable due care, should allow utilities to avoid liability. Strict liability should not be imposed for a condition inherent in electric distribution systems. The decision of the Court of Appeals should, therefore, be reversed.

Respectfully submitted,

AMICUS CURIAE

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ATTORNEYS' COST CERTIFICATE

I hereby certify that the cost of printing the foregoing Amicus Curiae Brief is in the sum of $120.00.

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IN THE SUPREME COURT OF IOWA
No. 1-517/00-0791
From Appellate Court Order Filed April 10, 2002

DANIEL MARTINS and COLEEN MARTINS, PLAINTIFFS/APPELLEE, vs. INTERSTATE POWER COMPANY, DEFENDANT/APPELLANT.	Clayton County No. LACV005049

APPEAL FROM THE DISTRICT COURT
FOR CLAYTON COUNTY
THE HONORABLE JAMES BEEGHLY

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ATTORNEYS FOR MOVANTS

AMICUS CURIAE APPLICATION

COME NOW Iowa Utility Association, Iowa Association of Municipal Utilities and Iowa Association of Electric Cooperatives, and pursuant to Iowa Rule of Appellate Procedure 6.18 move the Court as follows:

1. Movants understand a Request for Further Review is being sought by Interstate Power Company. The decision from which further review is sought is attached hereto as Exhibit "A

2. Movants are all electrical utilities or associations of utilities operating within the State of Iowa, and all have a direct interest in this Court's decisions concerning the standard of care applicable to electrical utilities.

3. The facts of the above-stated cause of action involve allegations regarding an electrical phenomenon commonly known as "stray voltage," which is a condition inherent in the delivery of all electrical service.

4. The facts of the above-stated cause of action also involve allegations regarding the use of a multi-grounded Wye distribution system, which is a code-complaint system most commonly used by utilities.

5. Pursuant to Iowa Rule of Appellate Procedure 6.18, Iowa Utility Association, Iowa Association of Municipal Utilities and Iowa Association of Electric Cooperatives request this Court's permission to join in the Request for Further Review and for permission to file Amicus Curiae Briefs in support of the Petition for Further Review, stating that the Appellate Court's decision in the above-stated cause can be read to create broad, new liability for electrical utilities under the rubric of "nuisance," which will have devastating consequences on all utilities operating in Iowa and on their customers.

6. Movants seek to join in the Request for Further Review and for permission to file Amicus Curiae Briefs in support of the Petition for Further Review on the grounds that the Appellate Court's decision has created a new and potentially devastating standard of care applicable to utilities by permitting any and all users of electricity to obtain large judgments based on complaints of a condition inherent in the delivery of electricity and without the necessity of showing negligence, fault or wrong-doing of any kind on the part of the utility. The decision can also be read to imply that the actions of the Plaintiff in a "nuisance" action, which may have been the cause, or at the very least a contributory cause to the harmful interference (stray voltage in the instant case), cannot be considered by the Court.

7. If this decision is allowed to stand, the electrical industry will be faced with a new standard not heretofore permitted, but expressly disallowed by the Legislature for compelling public policy grounds and expressly rejected by this Court in *Schlader v. Interstate Power Co.*, 591 N.W.2d 10, 13 (Iowa 1999).

8. Pursuant to Iowa Rule of Appellate Procedure 6.18 the Court may, for cause shown, grant leave for later filing. Movants respectfully submit that such cause exists in the instant case. While this cause has been under consideration by the Court for some time, it has only come to Movants' attention with the distribution of the Appellate Court's recent decision. The issues involved are substantial and require additional time in order that Movants may prepare Amicus Curiae Briefs that will truly assist the Court in arriving at a just and correct decision in this cause.

WHEREFORE, Movants respectfully request that they be permitted to join in the Request for Further Review and that they be permitted to file Amicus Curiae Briefs in support of the Petition For Further Review, to be filed by or at a date certain to be determined by the Court.

Respectfully submitted,

IOWA UTILITY ASSOCIATION,*[1]
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---

[1] *The members of the Iowa Utility Association are: Alliant Energy, Aquila, Inc., MidAmerican Energy Company and United Cities Gas Company

[2] **The members of the Iowa Association of Municipal Utilities are: Afton, Akron, Algona, Alta, Alta Vista, Alton, Ames, Anita, Anthon, Aplington, Atlantic, Auburn, Aurelia, Bancroft, Bellevue, Bloomfield, Breda, Brooklyn, Buffalo, Burt, Callender, Carlisle, Cascade, Cedar Falls, Coggon, Coon Rapids, Corning, Corwith, Danville, Dayton, Denison, Denver, Dike, Durant, Dysart, Earlville, Eldridge, Ellsworth, Estherville, Fairbank, Farnhamville, Fonda, Fontanelle, Forest City, Fredericksburg, Glidden, Gowrie, Graettinger, Grafton, Grand Junction, Greenfield, Grundy Center, Guttenberg, Harlan, Hartley, Hawarden, Hinton, Hopkinton, Hudson, Independence, Indianola, Keosauqua, Kimballton, La Porte City, Lake Mills, Lake Park, Lake View, Lamoni, Larchwood, Laurens, Lawler, Lehigh, Lenox, Livermore, Long Grove, Manilla, Manning, Mapleton, Maquoketa, Marathon, McGregor, Milford, Montezuma, Mt Pleasant, Muscatine, Neola, New Hampton, New London, Ogden, Onawa, Orange City, Orient, Osage, Panora, Paton, Paullina, Pella, Pocahontas, Preston, Primghar, Readlyn, Remsen, Renwick, Rock Rapids, Rockford, Sabula, Sanborn, Sergeant Bluff, Shelby, Sibley, Sioux Center, Spencer, Stanhope, Stanton, State Center, Story City, Stratford, Strawberry Point, Stuart, Sumner, Tennant, Tipton, Traer, Villisca, Vinton, Wall Lake, Waverly, Webster City, West Bend, West Liberty, West Point Utility System, Westfield, Whittemore, Wilton, Winterset, Woodbine, Woolstock

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REQUEST FOR ORAL ARGUMENT

Dennis Puckett and Michael May, Attorneys for Movants, request to be heard orally.

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ATTORNEYS' COST CERTIFICATE

I hereby certify that the cost of printing the foregoing Amicus Curiae Application is in the sum of $20.00.

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IN THE SUPREME COURT OF IOWA
No. 1-517/00-0791
Filed April 10, 2002

DANIEL MARTINS and COLEEN MARTINS,	)	
PLAINTIFFS/APPELLEE,	)	Clayton County
vs.	)	No. LACV005049
INTERSTATE POWER COMPANY,	)	
DEFENDANT/APPELLANT,	)	

APPEAL FROM THE DISTRICT COURT FOR CLAYTON COUNTY THE HONORABLE JAMES BEEGHLY

(Filed Apr. 30, 2002)

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APPLICATION FOR FURTHER REVIEW & BRIEF IN SUPPORT OF APPLICATION FOR FURTHER REVIEW

CERTIFICATE OF FILING

I hereby certify that on the 29th day of April, 2002, I, the undersigned did file the within Application For Further Review and Brief In Support of Application for Further Review on the Supreme Court by mailing Eighteen (18) copies thereof to:

Clerk of Supreme Court
State Capitol Building
Des Moines, IA 50319

by depositing the same in the United States Mail, with sufficient postage affixed thereon.

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PROOF OF SERVICE

I hereby certify that on the 29th day of April, 2002, I, the undersigned did serve the within Application For Further Review and Brief In Support of Application for Further Review on all other parties to this appeal or review by mailing two (2) copy [sic] thereof to the following attorneys:

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ONLY IOWA AND NATIONAL ELECTRIC SAFETY CODE COMPLIANT, BUT USED EVERYWHERE IN THIS COUNTRY, BY EVERY UTILITY, EVERY COMMISSION THAT REGULATES THOSE UTILITIES, AND BY EVERY STATE EXCEPT FOR "PART OF CALIFORNIA, MAYBE FLORIDA AND ONE CITY IN MICHIGAN," THE APPELLATE COURT INVADED THE PROVINCE OF THE IOWA LEGISLATURE AND THE IOWA UTILITIES BOARD, CHARGED WITH REGULATING THE DISTRIBUTION SYSTEMS EMPLOYED BY IOWA UTILITIES, AND VIOLATED THE SEPARATION OF POWERS DOCTRINE 10

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APPLICATION FOR FURTHER REVIEW

Interstate Power Company, the Appellant herein, respectfully requests the Supreme Court of Iowa, pursuant to Iowa Rule of Appellate Procedure 6.402, to grant further review of the decision rendered by the Court of Appeals of Iowa in this cause on April 10, 2002, and in support thereof states:

1. In rendering a decision which in effect permits the application of strict liability against a utility, the Appellate Court's decision conflicts with prior holdings of published Supreme Court decisions.

2. In rendering a decision which in effect permits the application of strict liability against a utility, the Appellate Court's decision conflicts with Legislative intent, permits what the Legislature has prohibited, and violates the separation of powers doctrine.

3. In rendering a decision which permits assessment of liability against a utility, with no finding of fault, negligence, or breach of any standard of due care by the utility, for a condition which is admitted to be inherent in the delivery of electrical service, and such is a standard never before applied, the Appellate Court decided a case which should have been retained by the Supreme Court.

4. In rendering a decision which permits assessment of liability against a utility, with no finding of fault, negligence, or breach of any recognized standard of due care, but which permits assessment of liability because the utility uses a distribution system not only Iowa and National Electrical Safety Code compliant, but used everywhere in this country, by every utility, every commission that regulates those utilities, and by every state except for "part of California, maybe Florida and one city in Michigan," the Appellate Court invaded the province of the Iowa Legislature and the Iowa Utilities Board, charged with regulating the distribution systems employed by Iowa utilities, and violated the separation of powers doctrine.

5. In rendering a decision which permits assessment of liability against a utility, with no finding of fault,

negligence, or breach of any recognized standard of due care, but which permits assessment of liability because the utility uses a distribution system not only Iowa and National Electric Safety Code compliant, but used everywhere in this country, by every utility, every commission that regulates those utilities, and by every state except for "part of California, maybe Florida and one city in Michigan," the Appellate Court decided a case which, because of compelling and far-reaching societal concerns, consequences and costs, should have been retained by the Supreme Court.

6. In rendering a decision which permits assessment of liability against a utility, while prohibiting the utility from presenting evidence of causation, the Appellate Court committed error of law.

7. In rendering a decision which permits assessment of liability on a claim of nuisance, while prohibiting evidence of an easement, the Appellate Court committed error of law.

8. In rendering a decision that affirms jury instructions so imbalanced that there was no verdict form submitted to allow the jury to find in Interstate's favor, the Appellate Court committed error of law.

9. The decision from which further review is sought is attached hereto as Exhibit "A."

WHEREFORE, Appellant, Interstate Power Company, respectfully requests the Supreme Court to grant further review of the decision of the Court of Appeals, and upon further review, to reverse the Judgment rendered in the trial court.

BRIEF IN SUPPORT OF APPLICATION FOR FURTHER REVIEW

On November 27, 1996, the Martins filed their Petition in this cause, seeking recovery from Defendant, Interstate Power Company for damages alleged to have been caused by stray voltage. (App. 13-18) The Petition was drafted in four separate divisions representing counts of strict liability, negligence, trespass, and nuisance. (App. 13-18). Approximately three and one-half years after commencement of suit, and approximately two weeks before trial, the Martins told the Court they were no longer claiming Interstate had trespassed or acted negligently toward them, and voluntarily dismissed three of the four counts they had plead [sic]. (App. 312-313). The case went forward and was tried on the sole count of common-law nuisance. (App. 312, Par.9) Though the Martins' initial complaint concerned allegations of "stray voltage," at trial the technical evidence relied upon by the Martins to support their claim of nuisance became testimony of "an adverse electrical environment" claimed to result from the presence of a lawfully placed substation located in close proximity to the property, and Interstate's use of a Code compliant multi-grounded Wye distribution system. (App. 528:8-22) The substation was built in 1947, more than forty years before the Martins bought their farm. (App. 711) According to the undisputed testimony presented by the Martins themselves, the multi-grounded Wye distribution system, complained of by them as creating a nuisance, is used everywhere in this country, by every utility, every commission that regulates those utilities, and by every state except for "part of California, maybe Florida and one city in Michigan." (App. 536:12-537:9) According to Mr. English, the Martins' own expert electrical engineer, the only way Interstate could avoid creating this "nuisance"

complained of by the Martins was for people to generate their own electricity, or for Interstate to reject Code and industry standards and practice in favor of the system advanced by Mr. English. (App. 533:10-534:2; 535:8-24; 476:14-18; 484:24-485:2; 701:20)

During the Martins' case-in-chief their expert electrician, Mr. Schmidt, testified at length concerning problems with the Martins' own electrical situation in their barn. (App. 530:7-12; 560-565) These problems had been outlined in interrogatories and at deposition by one of Interstate's experts, Mr. Shoemaker, as violations of the National Electrical Code governing the Martins' farm electrical service. (App. 759-769) In Mr. Shoemaker's opinion these problems existing in the Martins' own system and wiring caused stray voltage and were attributable to the Martins. (*Id*) Mr. Schmidt was permitted by the court to testify on direct examination by the Martins' counsel during the Martins' case-in-chief that there were no National Electrical Code violations, and that the conditions noted by Mr. Shoemaker were not problematic. (App. 550; 559:2-565:1) When Mr. Shoemaker began to testify to these same matters during Interstate's case-in-chief, after opening the door to such testimony from Mr. Schmidt, counsel for the Martins' objected on the grounds of "relevance." (App. 657) The trial court initially overruled the objection (App. 661:4-19) and Mr. Shoemaker continued to testify almost until testimony for that day concluded. (TT) The following morning, directly after Mr. Shoemaker's testimony, the trial court reversed its prior ruling on the relevance objection, struck the testimony and instructed the jury to disregard it. (App. 667:13-670:18)

During the course of the trial, Interstate attempted to introduce evidence of an easement held by it " . . . on,

through, over and across" the Martins' farm. (App. 393:5-394:23; 566:11-568:11) The trial court refused admission of the evidence, accepted an offer of proof, amended the pleadings to conform to proof, took Judicial Notice of the document recording the easement, but refused instruction to the jury on any issue related to easement, including what had been Judicially Noticed. (App. 393:5-394:23; 569:21-570:15; 566:11-568:11; 678:12-679:1)

Of the twenty-one final jury instructions given to the jury by the trial court, sixteen were the standard, Iowa Civil Jury Instructions, or modifications of them, but the remaining five instructions were drafted by the trial court. (App. 783-792) Special interrogatories denominated "Verdict Form" were submitted to the jury by the trial court, but no Verdict Form allowing the jury to respond by finding in favor of Interstate was ever submitted. (App. 793-794) On April 10, 2000, the jury found in favor of the Martins in the amount of $700,000. (App. 792-793).

On April 10, 2000, Interstate filed its Notice of Appeal. (App. 797). The case was assigned for oral argument to be heard by the Appellate Court on December 6, 2001. On April 10, 2002 Senior Judge Peterson, assigned by order pursuant to Iowa Code section 602.9206, affirmed the district court judgment.

1. IN RENDERING A DECISION WHICH IN EFFECT PERMITS THE APPLICATION OF STRICT LIABILITY AGAINST A UTILITY, THE APPELLATE COURT'S DECISION CONFLICTS WITH PRIOR HOLDINGS OF PUBLISHED SUPREME COURT DECISIONS.

Under the case as submitted to the jury by the district court, and as affirmed by the Appellate Court, liability was assessed against Interstate with no finding of fault, negligence or breach of any recognized standard of care. When a Court says that a defendant must pay damages although the defendant neither intentionally injured the plaintiff, nor violated the standard of care defined by and embodied within the law of negligence, isn't the court imposing strict liability? *See, Hagen v. Texaco Refining & Marketing*, 526 N.W.2d (Iowa 1995) (wherein a discussion of the use of the term "strict liability", under the heading "Liability without Fault," the Court outlines the many applications of strict liability, though not strictly denominated as "strict liability," recognized by this Court in situations of liability imposed without fault.) Isn't the essence of strict liability the imposition of liability without fault regardless of the name under which it is accomplished? Isn't that the essence of the Court's analysis of strict liability, in *Hagen*? This Court has long recognized that in determining the nature of the cause, the substance of the cause, and not the name applied to it, decides the question. *Murphy v. Board of Sup'rs of Johnson County*, 205 Iowa 256, 215 N.W. 744 (1927). In this case, while the name applied to the Martins' cause was "nuisance," the nature of the cause of strict liability. When the trial court accepted the Martins' call to remove all questions of negligence from this cause, and so instructed, it instructed that Interstate was to be held strictly liable. And when

that instruction was affirmed by the Appellate Court, it ruled that the law is that strict liability may be applied against a utility in a case involving stray voltage, so long as it is not called strict liability, but called "nuisance." But in *Schlader v. Interstate Power Co.*, 591 N.W.2d 10 (Iowa 1999) this Court refused to apply strict liability against utilities in claims involving stray voltage. Justice O.W. Holmes, Jr. warned that we in the law should think things and not words. In music, C♯ (sharp) is the same as D♭ (flat), though one represents a half step up, and the other a half step down. They have different names, but sound the same. "Strict liability" and "nuisance" have different names, but they sound the same. If the principle is as enunciated in *Schlader* that utilities are not to be held liable without fault, it makes no difference under what theory the application of strict liability principles are sought. The guise is only a disguise, and is contrary to prior published Supreme Court opinions.

In *Blackman v. Iowa Union Electric Co.*, 14 N.W.2d 21 (Iowa 1944), it is clearly stated that though the general rule is that regardless of the intention of the party or the degree of skill or care exercised, one may have created or maintained a nuisance, such a claim of nuisance against a utility " . . . can only be predicated upon negligence." *Id* at 723. This authority was presented and argued to the trial court. Yet without explanation, the trial court rejected that authority and applied what is in essence and effect a strict liability standard. In *Guzman v. Des Moines Hotel Partners*, 489 N.W.2d 7 (Iowa 1992) after an analysis of the authorities dealing with the law of nuisance, this Court concluded that the trial court, erred in submitting the issue of nuisance as a separate theory. This Court also recognized that as an academic matter, it might make

little difference whether an action is called a nuisance action or one based on negligence, but that the nature of the action makes considerable practical difference on the issue of apportionment of fault under Chapter 668. *Id* at 11.

Both the *Blackman* Court and the later *Guzman* Court struggled with nuisance claims, but resolved them in the same way. In *Blackman*, at 723, this Court said, "It is sometimes difficult to distinguish between actions of nuisance and actions bottomed on negligence," but acknowledged that under the expression of the rule that nuisance against a utility must be predicated upon negligence, and based on the rule of law that utilities are not insurers, a bare claim of nuisance against utilities cannot stand. The same rules that guided and decided the *Blackman* and *Guzman* Courts existed then and now, having been most recently reaffirmed in *Schlader*. The Appellate Court's decision to affirm the decision in this cause is in direct conflict with these earlier Supreme Court decisions.

2. IN RENDERING A DECISION WHICH IN EFFECT PERMITS THE APPLICATION OF STRICT LIABILITY AGAINST A UTILITY, THE APPELLATE COURT'S DECISION CONFLICTS WITH LEGISLATIVE INTENT, PERMITS WHAT THE LEGISLATURE HAS PROHIBITED, AND VIOLATES THE SEPARATION OF POWERS DOCTRINE.

In *Schlader v. Interstate Power Co.*, 591 N.W.2d 10 (Iowa 1999) Court said, "The Schladers urge us to adopt a rule of strict liability against power companies regarding stray voltage. Strict liability does not arise merely because a public utility is involved. . . . It seems apparent that we

would astonish the legislature if we were to adopt strict liability regarding stray voltage. An Iowa statute . . . formerly provided . . . in case of injury to any person or property by any such transmission line, negligence will be presumed on the part of the person or corporation operating said line. . . . This statute was repealed. Repeal of the statute weighs strongly against strict liability. We refuse to impose it." In *Schlader*, then, this Court gave due deference to the doctrine of separation of powers, and appropriately did not substitute its judgment for that of the Legislature on matters of policy. *See, State v. Johnson*, 630 N.W.2d 583, Iowa 2001. While the Legislature has not exempted utilities from cases brought under the Comparative Fault Act, it has expressed its intent that it is only under the provisions of that Chapter and the allocation of burdens found therein that utilities may be called to answer for the type of damages urged by the Martins. The Legislature has broad latitude in allocating burdens of proof. *State v. Wilt*, 333 N.W.2d 457 (Iowa 1983). The Legislature has allocated a burden of proof as to claims against utilities and has determined that strict liability is not to be assessed against them. This Court recognized that in *Schlader*. In the case at bar, by affirming the trial court judgment, the Appellate Court did not.

3. IN RENDERING A DECISION WHICH PERMITS ASSESSMENT OF LIABILITY AGAINST A UTILITY, WITH NO FINDING OF FAULT, NEGLIGENCE, OR BREACH OF ANY STANDARD OF DUE CARE BY THE UTILITY, FOR A CONDITION WHICH IS ADMITTED TO BE INHERENT IN THE DELIVERY OF ELECTRICAL SERVICE, AND SUCH IS A STANDARD NEVER BEFORE APPLIED IN IOWA, THE APPELLATE COURT DECIDED A CASE WHICH SHOULD HAVE BEEN RETAINED BY THE SUPREME COURT.

"Stray voltage" is a condition inherent in the delivery of electrical service. The Martin's second farm, not served by Interstate, but by another utility, was also monitored for stray voltage, with that second farm recording voltages higher than those recorded at the farm served by Interstate. (App. 458:5-21, 754) However, that other utility required the Martins to sign a document acknowledging that the Martins are aware that certain levels of "stray voltage", or neutral-to-earth voltage, the very thing claimed by them in this cause to be a nuisance, is inherent on electrical distribution systems. (App. 716) Interstate was where it had been asked to be by the Martins and their predecessors interest, and there with their consent. Interstate was acting under sanction of acts of the Legislature. Yet Interstate, with no finding of fault, negligence, or breach of any standard of due care, and for a condition which is admitted by the Martins to be inherent in the delivery of the electrical service requested by them and required by the Legislature, and despite having complied with very single applicable regulation, is assessed liability in the amount of $700,000 for being a "nuisance." How do we get there? Only by overturning long-standing precedent and long-held principles can the judgment entered by the

trial court on the claim of nuisance presented under the particular circumstances of this case be affirmed. Interstate respectfully submits that if this is to be done, it should be done by the Supreme Court. *Turner v. Turner*, 304 N.W.2d 786 (Iowa, 1982).

4. IN RENDERING A DECISION WHICH PERMITS ASSESSMENT OF LIABILITY AGAINST A UTILITY, WITH NO FINDING OF FAULT, NEGLIGENCE, OR BREACH OF ANY RECOGNIZED STANDARD OF DUE CARE, BUT WHICH PERMITS ASSESSMENT OF LIABILITY BECAUSE THE UTILITY USES A DISTRIBUTION SYSTEM NOT ONLY IOWA AND NATIONAL ELECTRIC SAFETY CODE COMPLIANT, BUT USED EVERYWHERE IN THIS COUNTRY, BY EVERY UTILITY COMMISSION THAT REGULATES THOSE UTILITIES, AND BY EVERY STATE EXCEPT FOR "PART OF CALIFORNIA, MAYBE FLORIDA AND ONE CITY IN MICHIGAN," THE APPELLATE COURT INVADED THE PROVINCE OF THE IOWA LEGISLATURE AND THE IOWA UTILITIES BOARD, CHARGED WITH REGULATING THE DISTRIBUTION SYSTEMS EMPLOYED BY IOWA UTILITIES, AND VIOLATED THE SEPARATION OF POWERS DOCTRINE.

The Iowa Legislature, in Chapter 474, created a "utilities division" and gave it general jurisdiction and supervision of "all lines for the transmission, sale, and distribution of electrical current for light, heat, and power." *Code of Iowa*, Chapter 474.1, 474.9. The Iowa Utilities Board regulates the construction and safety of electric transmission lines pursuant to chapter 478 of the *Code of Iowa*. The Legislature, through the Board, by

adoption of the National Electric Safety Code, has determined the use of multi-grounded Wye distribution systems appropriate. The trial court, by its instructions, the jury, by following them, and then the Appellate Court, by affirmation, assessed liability for the use of a system approved by the Legislature, the Utilities Board and the Code, without any finding of fault, negligence or breach of any standard of due care whatsoever. In doing so, the Judicial arm has determined to be a "nuisance" what the Legislature has determined to be acceptable practice. It is respectfully submitted that it cannot be both. Because the Legislature is charged with enacting laws that reflect desired social policies, and because a state's public policies are manifested in its statutes, it is properly within the province of the Legislature to decide which it is. *See, Doe v. Ray, 251 N.W.2d 496, Iowa 1977; Iowa Community School Dist. v. Iowa City Educ. Ass'n*, 343 N.W.2d 139 (Iowa 1983). In determining Legislative intent, this Court not only looks to the language of the statute, but the objects sought to be accomplished, the purpose served by the statute (or its repeal), the underlying policies, the remedies, and the consequences of the various interpretations. *Iowa Comprehensive Petroleum Underground Storage Tank Fund Bd. v. Mobil Oil Corp.*, 606 N.W.2d 359, (Iowa 2000). The Legislature recognized the consequences of the application of strict liability to utilities, and decided against accepting the cost. If the Appellate Court's decision stands, that decision is negated, and the separation of powers doctrine is grievously violated.

5. BECAUSE OF COMPELLING AND FAR-REACHING SOCIETAL CONCERNS, CONSEQUENCES AND COSTS, THIS CASE SHOULD HAVE BEEN RETAINED BY THE SUPREME COURT.

Exercise of reasonable care is a standard which has long and well served our civil justice system and its litigants. This standard provides a serviceable guide both to conduct and to the just and fair adjudication of that conduct. The use of this standard permits the parties – whether plaintiff or defendant – to anticipate a certain result if reasonable care has been exercised, and to anticipate quite a different result if it has not. It is especially important in the case of public service utilities that the exercise of reasonable care be the standard applied to questions of their conduct. Electricity is not merely a fact of life, today. It is a requirement. It is not that we couldn't live as well without it. It is that we could not live at all without it. Because of that, the transmission and distribution of electricity has become a heavily regulated public service. Utilities such as Interstate need to know that so long as they conduct themselves in compliance with applicable codes, and so long as they conduct themselves in complete accord with nationwide industry standards and practices, when questions of their conduct are raised and whether that conduct has caused harm to their customers, these utilities will be judged by the standard of whether they have exercised reasonable care. Without that assurance, public service utilities will have absolutely no guide for their conduct, and no basis for the important decisions they must make which affect the great mass of people they serve. Without that assurance, any and every utility could find itself in the position in which Interstate found itself in this case – follow all applicable codes and industry custom and practice, and face a $700,000.00

verdict for nuisance ***because it did***, or reject applicable codes and industry custom and practices, and face such a verdict for negligence ***because it did not***. This is not a choice. It is to hold at ransom public service utilities, perceived as big businesses with big pockets. But it takes one neither sage nor wise to predict the economic and societal cost of that ransom.

Is this to suggest that plaintiffs such as the Martins be left without a remedy if they believe they have been harmed by a public service utility? No. Chapter 668 provides a balanced, extensive, and comprehensive Legislative scheme that not only *would* have been available to the Martins, but *was* available and employed by them until, on their own motion, they dismissed those claims and convinced the trial court to reject long-standing, viable precedent and the clear underlying Legislative intent. What is the consequence? No utility is strong enough to withstand assessment of liability without findings of fault, particularly when as in this case, that assessment rests on complaints regarding a condition inherent in the very delivery of electricity. The hazards of such extreme liability will without doubt either cause insurers to refuse to insure against such risks or to demand catastrophic premiums because the risks can neither be calculated nor evaluated. Will this one particular case or verdict destroy Interstate? No. But the precedential value of this case will destroy not only Interstate but all Iowa electrical utilities. The precedential value of this case will leave all electrical utilities exposed to this new application of an old theory, that permits an end-run around the Legislature and an end-run around this Court's decision in *Schlader*. The assessment of liability without fault under the circumstances presented here is a

blueprint for disaster. It does not require much vision to see the new "mass tort." Eventually, electrical utilities, left hostage to claims of liability without fault, will falter and fold. No one on this side of the issue thinks it extreme to suggest that if this opinion stands, it would eventually mean lights out for Iowans. Not even judicial decision carries such profound social consequences. This judicial decision, allowing assessment of liability without fault, upon a Code compliant distribution system, based upon a claim for damages allegedly caused by a condition inherent in the very delivery of the electrical service itself, will affect virtually every business, occupation, school, home and individual in this State. If the decision is made that the costs and consequences of this decision are properly borne by them, then it is respectfully submitted, that cost should be assessed by Order of the Supreme Court and the same should be done with great and careful deliberation.

6. IN RENDERING A DECISION WHICH PERMITS ASSESSMENT OF LIABILITY AGAINST A UTILITY WHILE PROHIBITING THE UTILITY FROM PRESENTING EVIDENCE OF CAUSATION, THE APPELLATE COURT COMMITTED ERROR OF LAW.

During the Martins' case-in-chief their expert, Mr. Schmidt, testified at length concerning problems with the Martins' electrical situation in their barn. These problems had been outlined in interrogatories and at deposition by Mr. Shoemaker, one of Interstate's experts, as violations of the National Electrical Code governing the Martins' farm electrical service. In Mr. Shoemaker's opinion these problems that existed in the Martins' own system and wiring, for which they were responsible, caused stray

voltage. Mr. Schmidt testified at trial on direct examination by the Martins' counsel during the Martins' case-in-chief that there were no National Electrical Code violations, and that the conditions noted by Mr. Shoemaker were not problematic. When Mr. Shoemaker began to testify to these same matters during Interstate's case-in-chief, counsel for the Martins objected on the grounds, of relevance." Though the trial court initially overruled the objection, the day after Mr. Shoemaker's testimony, the trial court reversed its prior ruling, struck the testimony and instructed the jury to disregard it. Even under the narrow and incorrect view of the law of nuisance applied by the trial court, causation was still an element of proof charged to the Martins at the very least. *Bunn v. Standard Oil Co.*, 99 N.W.2d 436 (Iowa 1959). The stricken testimony was almost completely evidence of causation. By striking it, the court erred as a matter of law, and the Appellate Court's affirmation follows as error at law.

7. IN RENDERING A DECISION WHICH PERMITS ASSESSMENT OF LIABILITY ON A CLAIM OF NUISANCE, WHILE PROHIBITING EVIDENCE OF AN EASEMENT, THE APPELLATE COURT COMMITTED ERROR OF LAW.

In *Bormann v. Board of Sup'rs In and For Kossuth County*, 584 N.W.2d 309,315 (Iowa 1998), this Court said, "Over one hundred years ago, this Court held that the right to maintain a nuisance is an easement." This Court also said that easements may entitle their owners to do acts which, were it not for the easement, would constitute a nuisance. *Id* at 315. Interstate Power Company, its successors and assigns, had paid for and been granted, a perpetual right-of-way and easement with right and

privilege and authority to construct, operate [sic], maintain a line of poles, wires, etc. "for the purpose of transmitting electric or other power on, through, over and across" the Martins' property. (App. 710) But the trial court refused admission of any evidence of Interstate's easement, and in rendering its decision, the Appellate Court affirmed that refusal. In an action for private nuisance, an agreement that it might be maintained is a complete and absolute defense. *Ruthven v. Farmers Coop Creamery*, 140 Iowa 570, 118 N.W.915 (1908), and in holding the easement evidence inadmissible, the trial court cited no case law in support of it's [sic] ruling, but gratuitously said, . . . "I don't believe this language deals with the issue of having electricity in the earth." (App. 572:14-15) It is respectfully submitted that was the precise issue for the jury to decide, and that a reasonable fact-finder could and should have found that "transmitting electric or other power on, through, over and across" the Martins' property (particularly "on" and "through") very specifically dealt with the issue of "having electricity in the earth." The Martins' complaint was that electricity traveling through the earth adversely affected their dairy herd. This was the claimed nuisance, and Interstate was not permitted to show that if electricity "on, through, over and across" the Martins' ground was a nuisance, by virtue of its easement, under *Ruthven*, Interstate had a complete defense, and under *Bormann*, had a right to maintain it. This was an error of law, affirmed by the Appellate Court. It is also an error with implications which will effectively destroy utilities who operate on the understanding that they are protected from such nuisance claims as the Martins' by virtue of the easements they have paid to obtain. If their easements are to be held inadmissible evidence, and to be denied the status always before accorded them under

existing law, then, it is again respectfully submitted that this is a judgment properly to be considered with all its ramifications by the Supreme Court.

8. IN RENDERING A DECISION THAT AFFIRMS JURY INSTRUCTIONS SO IMBALANCED THAT THERE WAS NO VERDICT FORM SUBMITTED TO ALLOW THE JURY TO FIND IN INTERSTATE'S FAVOR, THE APPELLATE COURT COMMITTED ERROR OF LAW.

Those instructions given by the trial court that specifically related to nuisance and the Martins' claims were numbered 15, 16, 17 and 18. (App. 787-790) It appears from reading these instructions that they are selective compilations of extractions of certain general legal propositions derived from Iowa authorities, but without any controlling authority cited by the trial court, it is difficult to say what authorities the trial court relied upon. However, the selective extraction of certain principles by the trial court, and the rejection of others properly applicable to nuisance claims, led to instructions to the jury that were material misstatements of the law, both by inclusion and exclusion. The instructions are a text book compendium of grievous and unbelievable error. While the trial court has wide discretion in formulating appropriate instructions, the instructions given must be a correct statement of the law. *State v. Hibdon*, 505 N.W.2d 502 (Iowa Ct. App. 1993); *Bride v. Heckart*, 556 N.W.2d 449, 452 (Iowa 1996). The instructions must be balanced and alternatively stated. *Boyer v. Iowa High School Athletic Association*, 260 Iowa 1061, 152 N.W.2d 293 (1967); *Wagaman v. Ryan*, 258 Iowa 1352, 142 N.W.2d 413 (1966). But there is no balancing language in any instruction. For

example, nowhere in any instruction is balanced language such as, "In order to find that Interstate created a nuisance you must find that Interstate was unreasonable in the manner in which it conducted its business, at that place and under the existing circumstances. If you find that Interstate was conducting its business in a reasonable manner under the existing circumstances, then you must return a verdict in favor of Interstate." Nowhere, not even by verdict form, is the jury told under what, if any, condition they may be permitted to find in favor of Interstate. Even in Instruction Number 16, where the propositions of proof are stated, the jury is not told that a failure of proof requires a finding in Interstate's favor. Rather, the jury is told, "If the plaintiffs have failed to prove any of these propositions, they are not entitled to damages;" not that the Martins have failed to prove their claim of nuisance, not that Interstate is entitled to a verdict in its favor. The jury is told only that "they are not entitled to damages." Not only is this an incomplete and thereby inaccurate statement, but the failure to anywhere specifically instruct the jury how, when, or why the jury might find in favor of Interstate places undue emphasis on and in favor of the Martins' claim. Undue emphasis to either side is reversible error. *Clinton Land Co. v. M-S Associates, Inc.*, 340 N.W.2d 232 (Iowa 1983). No true verdict form was ever submitted to the jury where the jury is asked whether it decides in favor of Interstate and against the Martins or in favor of the Martins and against Interstate, despite the trial court being advised of that critical omission (App. 688:13-690:15) at the time of the recorded jury instruction conference (App. 680-694) and before the instructions had been given. This failure, following the combination and submission of the incomplete, inaccurate, erroneous, confusing, unbalanced instructions preceding it

had nothing less than the effect of directing the jury to return a verdict against one party, Interstate. This was error at law, as was the Appellate decision affirming it.

WHEREFORE, for all the reasons herein stated, Appellant, Interstate Power Company, respectfully requests the Supreme Court to grant further review of the decision of the Court of Appeals, and upon further review, to reverse the Judgment rendered in the trial court.

Respectfully submitted,

INTERSTATE POWER COMPANY,
APPELLANT

By: /s/ David L. Hammer (acs)
David L. Hammer

By: /s/ Angela C. Simon
Angela C. Simon

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REQUEST FOR ORAL ARGUMENT

Hammer, Simon & Jensen, Attorneys for Appellant, Interstate Power Company, request to be heard orally.

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ATTORNEYS' COST CERTIFICATE

I hereby certify that the cost of printing the foregoing Application For Further Review and Brief In Support of application for Further Review is in the sum of $112.00.

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IN THE IOWA DISTRICT COURT
FOR CLAYTON COUNTY

DANIEL MARTINS and COLEEN MARTINS,	)	
Plaintiffs,	)	Case No. LACV005049
vs.	)	JURY TRIAL
INTERSTATE POWER COMPANY,	)	VOLUME IV
Defendant.	)	

PROCEEDINGS:

This day's proceedings commenced at 9:05 a.m. on Wednesday, March 22, 2000, at the Clayton County Courthouse, Elkader, Iowa.

* * *

BEFORE:

THE HON. JAMES L. BEEGHLY

* * *

PLAINTIFF WITNESSES [sic] WILLIAM ENGLISH

* * *

Q Now, I would like to talk to you a little bit about the use of electricity in today's world.

Is it true that nobody is going to be able to totally eliminate earth currents, in your theory?

A Well no, there's a way to eliminate them.

Q And if you ever said there wasn't, you don't accept that?

A No, I don't accept that. There is a way to do it.

Q And that . . .

A Whether it's practical or not, that's a different story, but there is a way to do it.

Q And would you agree with me that if something isn't practical, it's really not a very good solution?

A Well, yes and no. The practicality comes with the people involved. And what my thoughts are, if [797] everybody generated their own electricity there wouldn't be any stray currents.

* * *

Q Is your answer yes or no, is one of the consequences of the use of electricity, stray voltage?

A It doesn't need to be.

Q But it is, isn't it, in our real present-day world?

A Based on the way it's being provided today, it is a real situation.

* * *

Q And you want the Delta system to be accepted by the utilities in the United States, isn't that right?

A Yes.

Q And that hasn't been done, has it?

A It's been done in California.

Q Well, it's been done in California and it's been done in your state in one town, hasn't it?

A Yes.

Q And that's it, isn't it?

A I don't know if it hasn't been done other places. I think Florida has done it too.

Q All right. Well, let's assume that Florida has. Florida, one town in Michigan, but a big town, Detroit. And what, all of California or just part of it.

A A good part of California.

Q Part of it in other words?

A I would say, yes.

Q And what is the system that is used in the rest [799] of the United States?

A Well, there's some DC and there's some grounded wye. But for transporting bulk power, it's a Delta system.

Q But we're talking about wye power here in a wye system?

A Talking about distribution circuits.

Q And that's the problem here, isn't it, as you see it, the distribution?

A Right. The problem is the lower the voltage the higher the current.

Q And the system that Interstate Power Company uses is the wye system?

A Yes.

Q And that's the same system used in every state except maybe Florida, parts of California, and one town in Michigan, is that right?

A Probably the eastern half of Michigan, the thumb and that area.

Q So if one then is looking at the two systems, one would have to conclude that a vast majority of public utilities use in their distribution system the wye system, wouldn't you?

A Yes.

Q And it has been approved by state regulatory [800] agencies in all those states in which it's used, isn't it?

A I suspect it has. I have got no proof of that, but I would believe it has been, yes.

Q Well, if I tell you it is, would you accept it?

A Yes, I won't dispute that.

Q And it has been approved by the Iowa Public Utility Commission, has it not? Or don't you know?

A I will accept that. I don't know absolutely, but I would think they would.

* * *

Q Now, do you know of any code that prohibits deriving a three-phase electric service for a dairy farm from two transformers?

A No.

Q Is it a violation of any code provision to use a multi-grounded wye distribution network?

A No.

* * *

TRIAL EXHIBIT 227

EXHIBIT "A"

NON-STANDARD SERVICE AGREEMENT

STRAY VOLTAGE

This agreement made as of the 2nd day of August, 1999 by and between Allamakee-Clayton Electric Cooperative, Inc., an incorporated cooperative association organized and existing under the laws of the State of Iowa, (hereinafter called the "Cooperative") and Dan/Martins (hereinafter called the "Member"):

WITNESSETH:

WHEREAS, the Cooperative owns and operates a complete rural electric distribution system for the distribution and supplying of electric energy to persons in rural areas of Allamakee, Clayton. Fayette and adjoining counties in the State of Iowa; and

WHEREAS, the Cooperative's electric distribution system is of a design and operating configuration which utilizes a multi-grounded neutral system, as provided for in state and national electric codes; and

WHEREAS, a neutral-to-earth voltage on the Cooperative's primary neutral is an inherent condition of a multi-grounded neutral system; and

WHEREAS, the Member owns and operates a livestock farm on lands situated in the Cooperative's service area, and it is the desire of the Member to enter into an agreement with the Cooperative for the purchase of electric energy on a non-standard basis for the operation of said farm; and

WHEREAS, the Member and the Cooperative have ascertained that the neutral-to-earth voltage existing within the livestock contact area is at an unacceptable level for the Member's operation; and

WHEREAS, the Member and the Cooperative have not been able to identify a reasonable means of mitigating the neutral-to-earth voltage to an acceptable level by modifications to the Member's own wiring system;

NOW, THEREFORE, for and in consideration of the mutual covenants and agreements herein contained, the parties hereto agree with each other as follows:

1. The Member recognizes and understands the disadvantages and potential safety hazards of primary and secondary neutral separation. The principle disadvantage to the member of primary-secondary neutral isolation is the loss of the Cooperative's multi-grounded neutral system to the member. If the member has poor grounding on his/her electrical service or system, the bonding of the member's grounds to the Cooperative's grounding system will provide for better possibility of operation of the member's overcurrent protective devices (i.e. fuses, circuit breakers, etc.), if a fault occurs on the member's wires. Without operation of the overcurrent device, a dangerous situation can exist. In addition, if a neutral-to-earth voltage problem exists on the premises, the added grounding of the Cooperative's utility system may help in preventing that voltage from becoming hazardous.

2. The Cooperative will separate and isolate the primary and secondary neutral with an appropriate isolating device.

3. The materials and devices used in providing the non-standard service of neutral separation will be owned and maintained by the Cooperative.

4. The Member does hereby and for his/her heirs, executors, administrators, successors, and assigns, release, acquit, and forever discharge the Cooperative and its agents, executors, and administrators of and from any and all claims, actions, causes of action, demands, rights, damages, costs, loss of service, expenses, and compensation whatsoever which the undersigned now has or which may hereafter accrue on account of or in any way grow out of the primary and secondary neutral separation. The Member further declares and represents that no promise, inducement, or agreement not herein expressed has been made and this Agreement contains the entire agreement between the parties hereto, and that the terms are contractual and not mere recital.

5. The Member agrees to notify the Cooperative immediately if he/she suspects the isolating device is not satisfactorily reducing the neutral-to-earth voltage.

6. This Agreement may be terminated at any time by either party should either determine that isolating is unnecessary or that another means of neutral-to-earth voltage reduction is found.

IN WITNESS THEREOF, the parties hereto have caused this Agreement to be executed the day and date above written.

ALLAMAKEE-CLAYTON
ELECTRIC COOPERATIVE, INC.

/s/ Colleen D. Martins
MEMBER

BY /s/ [Illegible]
TITLE Operations Supt.

CLARIFYING NOTE:

With regard to paragraph #6 above, removal of the isolator generally would be by mutual agreement by both parties to this Agreement and would be done within a reasonable time unless immediate action was necessary due to a safety concern(s).

584 N.W.2d 309

Clarence BORMANN and Caroline Bormann, Husband and Wife; Leonard McGuire and Cecelia McGuire, Husband and Wife, Appellants,

v.

BOARD OF SUPERVISORS IN AND FOR KOSSUTH COUNTY, Iowa; and Joe Rahm, Al Dudding, Laurel Fantz, James Black, and Donald McGregor, In Their Capacities as Members of the Board of Supervisors, Appellees,

Gerald Girres, Joan Girres, Mike Girres, Norma Jean Thul, Jerald Thilges, Shirley Thilges, Thelma Thilges, Edwin Thilges, Ralph Reding, Loretta Reding, Bernard Thilges, Jacob Thilges, John Goecke, and Patricia Goecke, Intervenors-Appellees.

No. 96-2276.

Supreme Court of Iowa.

Sept. 23, 1998.

Michael E. Gabor of Buchanan, Buchanan, Bibler, Buchanan & Handsaker, Algona, for appellants.

David C. Skilling, County Attorney, for appellees.

Eldon L. McAfee of Beving, Swanson & Forrest, Des Moines, for intervenor-appellees.

Christina L. Gault of Iowa Farm Bureau Federation, West Des Moines, for amicus curiae.

Considered en banc.

LAVORATO, Justice.

In this appeal we are asked to decide whether a statutory immunity from nuisance suits results in a taking of private property for public use without just compensation in violation of federal and Iowa constitutional provisions. We think it does. We therefore reverse a district court ruling holding otherwise and remand. In doing so, we need not reach a second constitutional challenge.

I. Facts and Proceedings.

The facts are not in dispute. In September 1994, Gerald and Joan Girres applied to the Kossuth County Board of Supervisors for establishment of an "agricultural area" that would include land they owned as well as property owned by Mike Girres, Norma Jean Thul, Gerald Thilges, Shirley Thilges, Thelma Thilges, Edwin Thilges, Ralph Reding, Loretta Reding, Bernard Thilges, Jacob Thilges, John Goecke, and Patricia Goecke (applicants). *See* Iowa Code § 352.6 (1993). The real property involved consisted of 960 acres. On November 10, 1994, the Board denied the application, making the following findings and conclusions:

> a. The Board finds that the policy in favor of agricultural land preservation is not furthered by an Agricultural Area designation in this case as there are no present or foreseeable nonagricultural development pressures in the area for which the designation is requested.
>
> b. The Board also finds that the Agricultural Area designation and the nuisance protections provided therein will have a direct and permanent impact on the existing and long-held private property rights of the adjacent property owners.

c. Thus, the Board concludes that the policy in favor of agricultural land preservation as set forth in Iowa Code chapter 352 is outweighed by the policy in favor of the preservation of private property rights.

d. Accordingly, the Board finds that the adoption of the Agricultural Area designation in this case is inconsistent with the purposes of Iowa Code chapter 352.

Two months later, in January 1995, the applicants tried again with more success. The Board approved the agricultural area designation by a 3-2 vote – one of which was based on the "flip [of] a nickel." In granting the designation, the Board this time found that the application to create the agricultural area designation "complies with Iowa Code section 352.6 and that the adoption of the proposed agricultural area is consistent with the purposes of Chapter 352."

In April 1995, several neighbors of the new agricultural area filed a writ of certiorari and declaratory judgment action in district court. The defendants were the Board and individual board members Joe Rahm, Al Dudding, Laurel Fantz, James Black, and Donald McGregor (Board).

The plaintiffs, Clarence and Caroline Bormann and Leonard and Cecelia McGuire (neighbors), challenged the Board's action in a number of respects. The neighbors alleged the Board's action violated their constitutionally inalienable right to protect property under the Iowa Constitution, deprived them of property without due process or just compensation under both the federal and Iowa Constitutions, denied them due process under the federal and Iowa Constitutions, ran afoul of res judicata

principles, and was "arbitrary and capricious." The applicants intervened.

Based on stipulated facts, memoranda and oral argument, the district court determined that the Board's action was "arbitrary and capricious." Apparently, the determination was based on one Board member voting on the basis of a flipped coin. This was the only ground on which the court ruled for the neighbors. The court rejected all of their other arguments.

Later, the neighbors filed an Iowa Rule of Civil Procedure 179(b) motion asking the court to clarify its ruling. Meanwhile, the Board corrected the "arbitrary and capricious" infirmity to its November 1995 vote. The neighbors then sought, and received, a certification of appeal from this court.

II. Scope of Review.

The neighbors sued at law and titled their petition as one for writ of certiorari and one for declaratory judgment. In the petition for writ of certiorari, the neighbors asked that a writ of certiorari issue because the Board's decision was in excess of" the Board's "jurisdiction" and was "contrary to law" and "illegal" because the decision "violates the Fifth Amendment to the United States Constitution, and article I, section 18 of the Iowa Constitution" in that the decision "effects a taking of the [neighbors'] private property for a use that is not public." The petition asked that the decision be annulled and decreed to be void.

In the petition for declaratory relief, the neighbors sought a declaration that the Board's decision violates the "Fifth Amendment to the United States Constitution, the

Fourteenth Amendment to the United States Constitution, and article I, section 18 of the Iowa Constitution."

Iowa Rule of Civil Procedure 306 authorizes the district court to issue a writ of certiorari "where an inferior tribunal, *board or officer* exercising judicial functions, is alleged to have exceeded its, or his proper jurisdiction or otherwise acted illegally." (Emphasis added.) Our scope of review is limited to sustaining a board's decision or annulling it in whole or in part. *Grant v. Fritz,* 201 N.W.2d 188, 189 (Iowa 1972). In addition, the fact that the plaintiff has another adequate remedy does not preclude granting the writ. Iowa R. Civ. P. 308.

Thus, here, a petition for a writ of certiorari is appropriate to test the legality of the Board's decision. Our scope of review is limited to sustaining the Board's decision or annulling it in whole or in part. In addition, the fact that the neighbors may have another adequate remedy, like declaratory judgment, does not preclude our granting relief under Rule 306.

Iowa Rule of Civil Procedure 261 (declaratory judgment) authorizes "[c]ourts of record within their respective jurisdiction [to] declare rights, status, and other legal relations whether or not further relief is or could be claimed."

The purpose of a declaratory judgment is to determine rights in advance. *Miehls v. City of Independence,* 249 Iowa 1022, 1030, 88 N.W.2d 50, 55 (1958). The essential difference between such an action and the usual action is that no actual wrong need have been committed or loss incurred to sustain declaratory judgment relief. *Id.* at 1031, 88 N.W.2d at 55. But there must be no uncertainty that the loss will occur or that the right asserted will be

invaded, *id.* As with a writ of certiorari, the fact that the plaintiff has another adequate remedy does not preclude declaratory judgment relief where it is appropriate. Iowa R. Civ. P. 261.

We think the facts here are sufficient for us to proceed under either remedy. In addition, because the facts are not in dispute, we need not concern ourselves with whether we employ a correction-of-errors-at-law review or a de novo review. Our only question is a legal one.

III. The Takings Challenge.

A. The parties' contentions. The Board's approval of the agricultural area here triggered the provisions of Iowa Code section 352.11(1)(a). More specifically, the approval gave the applicants immunity from nuisance suits. The neighbors contend that the approval with the attendant nuisance immunity results in a taking of private property without the payment of just compensation in violation of federal and state constitutional provisions.

The neighbors concede, as they must, that their challenge to section 352.11(1)(a) is a facial one because the neighbors have presented neither allegations nor proof of nuisance. However, the neighbors strenuously argue that in a facial challenge context courts have developed certain bright line tests that spare them from this heavy burden. Specifically, the neighbors say, these bright line tests provide that a governmental action resulting in the condemnation or the imposition of certain specific property interests constitutes automatic or per se takings.

Here, the neighbors argue further, that the section 352.11(1)(a) immunity provision gives the applicants the

right to create or maintain a nuisance over the neighbors' property, in effect creating an easement in favor of the applicants. The creation of the easement, the neighbors conclude, results in an automatic or per se taking under a claim of regulatory taking.

The Board and applicants respond that a per se taking occurs only when there has been a permanent physical invasion of the property or the owner has been denied all economically beneficial or productive use of the property. They insist the record reflects neither has occurred. Thus, they contend, the court must apply a balancing test enunciated in *Penn Central Transportation Co. v. City of New York,* 438 U.S. 104, 98 S.Ct. 2646, 57 L.Ed.2d 631 (1978). They argue that under that balancing test the neighbors lose.

B. The relevant constitutional and statutory provisions.

1. The constitutional provisions. The Fifth Amendment to the Federal Constitution pertinently provides that " [n]o person shall be . . . deprived of life, liberty, or property without due process of law; nor shall private property be taken for public use, without just compensation." The Fourteenth Amendment to the Federal Constitution prohibits a state from "depriving any person of life, liberty, or property without due process of law." The Fourteenth Amendment makes the Fifth Amendment applicable to the states and their political subdivisions. *Chicago B. & Q. R.R. v. City of Chicago,* 166 U.S. 226, 234-35, 17 S.Ct. 581, 584, 41 L.Ed. 979, 983-84 (1897).

Article I, section 9 of the Iowa Constitution pertinently provides that "[n]o person shall be deprived of life,

liberty, or property, without due process of law." Article I, section 18 of the Iowa Constitution provides:

> **Eminent domain – drainage ditches and levees.** Private property shall not be taken for public use without just compensation first being made, or secured to be made to the owner thereof, as soon as the damages shall be assessed by a jury.

2. The statutory provisions. Iowa Code section 352.6 sets forth the procedure for obtaining an agricultural area designation. The application is to the county board of supervisors. Iowa Code § 352.6. This provision also prescribes the conditions under which a county board of supervisors may designate farmland as an agricultural area. *Id.* An agricultural area includes, among other activities, raising and storing crops, the care and feeding of livestock, the treatment or disposal of wastes resulting from livestock, and the creation of noise, odor, dust, or fumes. Iowa Code § 352.2(6).

Iowa Code section 352.11(1)(a) provides the immunity from nuisance suits:

> A farm or farm operation located in an agricultural area shall not be found to be a nuisance regardless of the established date of operation or expansion of the agricultural activities of the farm or farm operation. This paragraph shall apply to a farm operation conducted within an agricultural area for six years following the exclusion of land within an agricultural area other than by withdrawal as provided in section 352.9.

The immunity does not apply to a nuisance resulting from a violation of a federal statute, regulation, state statute, or rule. Iowa Code § 352.11(1)(b). Nor does the immunity apply to a nuisance resulting from the negligent

operation of the farm or farm operation. *Id.* Additionally, there is no immunity from suits because of an injury or damage to a person or property caused by the farm or farm operation before the creation of the agricultural area. *Id.* Finally, there is no immunity from suit "for an injury or damage sustained by the person [bringing suit] because of the pollution or change in condition of the waters of a stream, the overflowing of the person's land, or excessive soil erosion into another person's land, unless ~~the injury~~ or damage is caused by an act of God." *Id.*

Iowa Code section 657.1 defines nuisance and provides for civil remedies:

> Whatever is injurious to health, indecent, or unreasonably offensive to the senses, or an obstruction to the free use of property, so as essentially to unreasonably interfere with the comfortable enjoyment of life or property, is a nuisance, and a civil action by ordinary proceedings may be brought to enjoin and abate the same and to recover damages sustained on account thereof.

Iowa Code section 657.2 is a laundry list of the conduct or conditions that are deemed to be a nuisance. Those that are relevant to nuisances resulting from farming and farm operations include:

> 1. The erecting, continuing, or using any building or other place for the exercise of any trade, employment, or manufacture, which, by occasioning noxious exhalations, unreasonably offensive smells, or other annoyances, becomes injurious and dangerous to the health, comfort, or property of individuals or the public.

> 2. The causing or suffering any offal, filth, or noisome substance to be collected or to remain in any place to the prejudice of others.
>
> . . . .
>
> 4. The corrupting or rendering unwholesome or impure the water of any river, stream, or pond, or unlawfully diverting the same from its natural course or state, to the injury or prejudice of others.

Iowa Code § 657.2.

Our cases recognize that the statutory definition of nuisance does not "modify the common-law's application to nuisances." *Weinhold v. Wolff* 555 N.W.2d 454, 459 (Iowa 1996). Rather, the statutory provisions "are skeletal in form, and [we] look to the common law to fill in the gaps." *Id.*

There are two kinds of nuisances: public and private. We cited the differences between the two in *Guzman v. Des Moines Hotel Partners*:

> A public or common nuisance is a species of catchall criminal offenses, consisting of an interference with the rights of a community at large. This may include anything from the obstruction of a highway to a public gaming house or indecent exposures. A private nuisance, on the other hand, is a civil wrong based on a disturbance of rights in land. . . . The essence of a private nuisance is an interference with the use and enjoyment of land. Examples include vibrations, blasting, destruction of crops, flooding, pollution, and disturbance of the comfort of the plaintiff, as by unpleasant odors, smoke, or dust.

489 N.W.2d 7, 10 (Iowa 1992) (citations omitted). We are dealing here with private nuisances.

To fully understand the issues we are about to discuss, we think it would aid our analysis to distinguish between the concepts of "private nuisance" and "trespass." We made this distinction in *Ryan v. City of Emmetsburg*:

> As distinguished from trespass, which is an actionable invasion of interests in the exclusive possession of land, a private nuisance is an actionable invasion of interests in the use and enjoyment of land. Trespass comprehends an actual physical invasion by tangible matter. An invasion which constitutes a nuisance is usually by intangible substances, such as noises or odors.

232 Iowa 600, 603, 4 N.W.2d 435, 439 (1942).

In *Ryan*, we also distinguished between the concepts of "nuisance" and "negligence." Negligence is a type of liability-forming conduct, for example, a failure to act reasonably to prevent harm. *Id.* In contrast, nuisance is a liability-producing condition. *Id.* Negligence may or may not accompany a nuisance; negligence, however, is not an essential element of nuisance. *Id.* If the condition constituting the nuisance exists, the person responsible for it is liable for resulting damages to others even though the person acted reasonably to prevent or minimize the deleterious effect of the nuisance. *Id.*

C. The framework of analysis. As the neighbors point out, the federal and state constitutional provisions we set out earlier provide the following framework for a "takings" analysis: (1) Is there a constitutionally protected private property interest at stake? (2) Has this private property interest been "taken" by the government for public use? and (3) If the protected property interest has been taken, has just compensation been paid to the owner?

The neighbors contend there is a constitutionally protected private right which the Board has taken from them without paying just compensation. That taking, the neighbors contend, results from the Board's approval of the agricultural area triggering the nuisance immunity in section 352.11(1)(a). The Board and the applicants concede the neighbors have received no compensation so we need not concern ourselves with the third step of the analysis: Has just compensation been paid to the owner?

1. Is there a constitutionally protected private property interest at stake?

a. Does the immunity provision in section 352.11(1)(a) against nuisance suits create a property right? Textually, the federal and Iowa Constitutions prohibit the government from taking property for public use without just compensation. Property for just compensation purposes means "the group of rights inhering in the citizens' relation to the physical thing, as the right to possess, use and dispose of it." *United States v. General Motors Corp.*, 323 U.S. 373, 378, 65 S.Ct. 357, 359, 89 L.Ed. 311, 318 (1945). In short, property for just compensation purposes includes "every sort of interest the citizen may possess." *Id.; see also Liddick v. Council Bluffs,* 232 Iowa 197, 221-22, 5 N.W.2d 361, 374 (1942) ("[P]roperty is not alone the corporeal thing, but consists also in certain rights therein created and sanctioned by law, of which, with respect to land, the principal ones are the rights of use and enjoyment. . . . ").

State law determines what constitutes a property right. *Webb's Fabulous Pharmacies, Inc. v. Beckwith*, 449 U.S. 155, 161, 101 S.Ct. 446, 451, 66 L.Ed.2d 358, 362

(1980). Thus, in this case, Iowa law defines what is property.

The property interest at stake here is that of an easement, which is an interest in land. Over one hundred years ago, this court held that the right to maintain a nuisance is an easement. *Churchill v. Burlington Water Co.*, 94 Iowa 89, 93, 62 N.W. 646, 647 (1895). *Churchill* defines an easement as

> a privilege without profit, which the owner of one neighboring tenement [has] of another, existing in respect of their several tenements, by which the servient owner is obliged to suffer, or not do something on his own land, for the advantage of the dominant owner.

Id.

Churchill's holding that the right to maintain a nuisance is an easement and its definition of an easement are consistent with the Restatement of Property:

> An easement is an interest in land which entitles the owner of the easement to *use* or enjoy land in the possession of another. . . . It may entitle him to do acts which he would otherwise not be privileged to do, or it may merely entitle him to prevent the owner of the land subject to the easement from doing acts which he would otherwise be privileged to do. An easement which entitles the owner to do acts which, were it not for the easement, he would not be privileged to do, is an affirmative easement. . . . [The easement] may entitle [its] owner to do acts on his own land which, were it not for the easement, would constitute a nuisance.

Restatement of Property § 451 cmt. a, at 2911-12 (1944) (emphasis added).

Another feature of easements is that easements run with the land:

> The land which is entitled to the easement or service is called a dominant tenement, and the land which is burdened with the servitude is called the servient tenement. Neither easements [n]or servitudes are personal, but they are accessory to, and run with, the land. The first with the dominant tenement, and the second with the servient tenement.

Dawson v. McKinnon, 226 Iowa 756, 767, 285 N.W. 258, 263 (1939).

Thus, the nuisance immunity provision in section 352.11(1)(a) creates an easement in the property affected by the nuisance (the servient tenement) in favor of the applicants' land (the dominant tenement). This is because the immunity allows the applicants to do acts on their own land which, were it not for the easement, would constitute a nuisance. For example, in their farming operations the applicants would be allowed to generate "offensive smells" on their property which without the easement would permit affected property owners to sue the applicants for nuisances. *See* Iowa Code § 3522(6); *see also Buchanan v. Simplot Feeders Ltd. Partnership,* 134 Wash.2d 673, 952 P.2d 610, 615 (1998) (holding that Washington's Right-to-Farm Act gives farm quasi easement, against urban developments that subsequently locate next to farm, to continue nuisance activities) (dictum).

b. Is an easement a protected property right subject to the requirements of the just compensation clauses of the federal and Iowa Constitutions? Easements are property interests subject to the just compensation requirements of the Fifth Amendment to the

Federal Constitution. *United States v. Welch,* 217 U.S. 333, 339, 30 S.Ct. 527, 527, 54 L.Ed. 787, 788 (1910). Easements are also property interests subject to the just compensation requirements of our own Constitution. *Simkins v. City of Davenport* 232 N.W.2d 561, 566 (Iowa 1975).

c. Has the easement resulted in a taking?

(1) **Takings jurisprudence, generally.** There are two categories of state action that *must* be compensated without any further inquiry into additional factors, such as the economic impact of the governmental conduct on the landowner or whether the regulation substantially advances a legitimate state interest. The two categories include regulations that (1) involve a permanent physical invasion of the property or (2) deny the owner all economically beneficial or productive use of the land. *Lucas v. South Carolina Coastal Council*, 505 U.S. 1003, 112 S.Ct. 2886, 120 L.Ed.2d 798 (1992). These two categories are what the neighbors term "per se" takings. The per se rule regarding the first category – physical invasion – was firmly established in *Loretto v. Teleprompter Manhattan CATV Corp.,* 458 U.S. 419, 425, 102 S.Ct. 3164, 3171, 73 L.Ed.2d 868, 886 (1982).

Presumably, in all other cases involving "regulatory takings" challenges, the United States Supreme Court engages in a case-by-case examination in determining at which point the exercise of the police power becomes a taking. *Id.* This ad hoc approach calls for a balancing test that is essentially one of reasonableness. The test focuses on three factors: (1) the economic impact of the regulation

on the claimant's property; (2) the regulation's interference with investment-backed expectations; and (3) the character of the governmental action. *Penn Cent. Transp. Co. v. New York City,* 438 U.S. 104, 124, 98 S.Ct. 2646, 2659, 57 L.Ed.2d 631, 648 (1978). According to some commentators, a court must first find that the regulation substantially advances legitimate state interests before the court may test the regulation against the three factors in *Penn Central. See, e.g.,* Craig A. Peterson, *Land Use Regulatory "Takings" Revisited: The New Supreme Court Approaches,* 39 Hastings L.J. 335, 351 (1988).

(2) Physical invasion. The Board and applicants contend the neighbors' argument fails under both categories of per se takings: physical invasion and denial of all economically beneficial or productive use of the property. The neighbors do not contend the record supports a finding that the challenged statute denies them all economically beneficial or productive use of their property. Accordingly, we restrict our discussion to the physical invasion category.

According to one commentator,

> [t]he term "regulatory taking" refers to situations in which the government exercises its "police powers" to restrict the use of land or other forms of property. This is often accomplished through implementation of land use planning, zoning and building codes. In contrast, a governmental entity exercises its eminent domain power or acts in an "enterprise capacity, where it takes unto itself private resources and uses them for the common good." Where the private landowner will not sell the land, the government entity seeks condemnation of the property and pays a fair purchase price to be determined in court. On the other hand, an inverse condemnation claim is sought

> by a landowner when the government fails to seek a condemnation action in court.

John W. Shonkwiler & Terry Morgan, *Land Use Litigation* § 1.02, at 6 (1986) [hereinafter Shonkwiler]. The neighbors' challenge here is one of inverse condemnation.

We think it would aid our analysis of the neighbors' takings argument to discuss those cases where a government entity acting in its enterprise capacity has appropriated private property without first exercising its eminent domain power.

(a) Trespassory invasions of private property by government enterprise. Generally, when the government has physically invaded property in carrying out a public project and has not compensated the landowner, the United States Supreme Court will find that a per se taking has occurred. *See* Shonkwiler § 10.01(1), at 369. For example, in *Pumpelly v. Green Bay & Mississippi Canal Co.,* the Court held there was a taking where the defendant's construction of a dam, pursuant to state authority, permanently flooded the plaintiff's property. 13 Wall. 166, 80 U.S. 166, 181, 20 L.Ed. 557, 561 (1871). In so holding, the Court enunciated the following rule:

> [W]here real estate is actually invaded by superinduced additions of water, earth, sand, or other material, or by having any artificial structure placed on it, so as to effectually destroy or impair its usefulness, it is a taking, within the meaning of the constitution.

Id.

In a more recent case, the Court applied the same rule to a state law that authorized third parties to physically intrude upon private property. *Loretto,* 458 U.S. at 432 n.

9, 102 S.Ct. at 3174 n. 9, 73 L.Ed.2d at 880 n. 9 (holding that a New York statute requiring the owners of apartment buildings to permit cable television operators to install transmission facilities on their property was in violation of the Just Compensation Clause).

(b) Nontrespassory invasions of private property by government enterprise. To constitute a per se taking, the government need not physically invade the surface of the land. *See* Shonkwiler § 10.02(2), at 370. For example, in *United States v. Causby,* the Court held that the frequent and regular flights of government planes over the plaintiffs' land had created an easement in the lands for the benefit of the government. 328 U.S. 256, 266-67, 66 S.Ct. 1062, 1068, 90 L.Ed. 1206, 1213 (1946). The plaintiffs owned a small chicken farm near an airport leased by the government for use by army and navy aircraft. The glide path of one of the runways passed right over the plaintiffs' land at a height of only eighty-three feet. As a result of the aircraft's noise, the plaintiffs had to abandon their commercial chicken operation. *Id.*

The Court held that the flights' interference with the use of the plaintiffs' land constituted a taking of a flight easement that had to be compensated on the basis of diminution in the land's value resulting from the easement. *Id.* at 261-62, 66 S.Ct. at 1066, 90 L.Ed. at 1210. In the course of its opinion, the Court stated:

> [T]he flight of airplanes, which skim the surface but do not touch it, is as much an appropriation of the use of the land as a more conventional entry upon it. . . . The reason is that there [is] an intrusion so immediate and direct as to subtract from the owner's full enjoyment of the property and to limit his exploitation of it. . . . The superadjacent airspace at this low

> altitude is so close to the land that continuous invasions of it affect the use of the surface of the land itself. We think the landowner, as an incident to his ownership, has a claim to it and invasions of it are in the same category as invasions of the surface. . . . Flights over private land are not a taking, unless they are so low and so frequent as to be a direct and immediate interference with the enjoyment and use of the land. We need not speculate on that phase of the present case. For the findings of the Court of Claims plainly establish that there was a diminution in value of the property and that the frequent, low-level flights were the direct and immediate cause. We agree with the Court of Claims that a servitude has been imposed upon the land.

Id. at 265-67, 66 S.Ct. at 1067-68, 90 L.Ed. at 1212-13; *accord Griggs v. Allegheny County,* 369 U.S. 84, 89, 82 S.Ct. 531, 533-34, 7 L.Ed.2d 585, 588-89 (1962); *see also Portsmouth Harbor Land & Hotel Co. v. United States,* 260 U.S. 327, 43 S.Ct. 135, 67 L.Ed. 287 (1922) (holding that firing, and imminent threat of firing, of navy coastal guns over plaintiffs property imposed a "servitude" upon the plaintiff's land and thus amounted to a taking of some interest for public use); *Dolezal v. City of Cedar Rapids,* 209 N.W.2d 84, 87 (Iowa 1973) (recognizing a navigation easement as one that permits free flights over land including those so low and so frequent as to amount to a taking of property); 2A Philip Nichols, *Eminent Domain* § 6.06, at 6-92 (3d rev. ed. 1998) ("Physical invasions of property are not limited to human or even vehicular entry. To the contrary, the majority of cases involve the transmission of smoke, dust, earth, water, sewage or some other agent onto the impacted property. Regardless of the agent, the result of the invasion may be diminution in values of the

property, partial or complete (and permanent and temporary) appropriation, or complete destruction.") [hereinafter Nichols].

In *Fitzgarrald v. City of Iowa City,* 492 N.W.2d 659, 663 (Iowa 1992), we had occasion to consider a physical invasion claim involving overflying aircraft. As in *Causby,* the plaintiffs in *Fitzgarrald* claimed the overflying aircraft so adversely affected the use and enjoyment of their property that a taking had resulted. We rejected the claim because the plaintiffs had failed to prove a "measurable decrease in market value" due to the overflying aircraft. *Id.* at 665. Nevertheless, we cited *Causby* for the proposition that "[in some circumstances, overflying aircraft may amount to a physical invasion." *Id.* We recognized that when interferences with property from overflying aircraft result in a measurable decrease in property market value, a taking has occurred. *Id.* at 663. In such cases, we said "the right to recovery is not for the nuisance that must be endured but for the loss of value that has resulted." *Id.* The loss-in-value measure of damages is what we would ordinarily use in eminent domain cases. *Id.* As mentioned, *Causby* used this same measure of damages.

The United States Supreme Court has allowed compensation for other kinds of interferences short of physical taking or touching of land. *See* William B. Stoebuck, *Condemnation by Nuisance: The Airport Cases in Retrospect and Prospect,* 71 Dick. L.Rev. 207, 220-21 (1967) [hereinafter Stoebuck]. For example, in *United States v. Welch,* the plaintiff had a passage easement over a neighbor's property. 217 U.S. 333, 339, 30 S.Ct. 527, 527, 54 L.Ed. 787, 789-90 (1910). The passage was the plaintiff's only access to a county road. The government flooded the neighbor's property thereby cutting off the plaintiffs

only access to the road. The Court held the plaintiff was entitled to compensation for the easement. *Id.* at 339, 30 S.Ct. at 527, 54 L.Ed. at 789-90. Because the benefitted land – plaintiff's property – was not physically touched, this case is "a clear example of condemnation without any physical taking." Stoebuck, at 221; *see Nollan v. California Coastal Comm'n,* 483 U.S. 825, 831, 107 S.Ct. 3141, 3143, 97 L.Ed.2d 677, 687 (1987) (holding that requiring property owner to give easement of access across his property to obtain a building permit was a physical taking of private property that required compensation).

In *Pennsylvania Coal Co. v. Mahon,* a state statute prohibited coal mining if it were done in a manner to cause subsidence of any dwelling. *Pennsylvania Coal Co. v. Mahon,* 260 U.S. 393, 43 S.Ct. 158, 67 L.Ed. 322 (1922). The plaintiff had a contract to mine coal under a dwelling but the statute prevented the plaintiff from doing so. *Id.* The Court held the statute was an attempt to condemn property – the right to mine coal – without compensation. *Id.* at 414, 43 S.Ct. at 159-60, 67 L.Ed. at 326. *Mahon* "is a situation in which, by denying an owner the occupancy and use of his property interest, the government takes the interest without any semblance of physical intrusion." Stoebuck, at 221.

Richards v. Washington Terminal Co. presents a factual scenario closer to the facts in this case. 233 U.S. 546, 34 S.Ct. 654, 58 L.Ed. 1088 (1914). In *Richards,* the plaintiff owned residential property along the tracks of a railroad that had the power of eminent domain. The property lay near the mouth of a tunnel. The Court recognized that two kinds of the railroad's activities had partially destroyed the plaintiffs interest in the enjoyment of his property. The first kind involved smoke, dust, cinders,

and vibrations invading the plaintiff's property at all points at which the property abutted the tracks. The second kind involved gases and smoke emitted from engines in the tunnel that contaminated the air and invaded the plaintiff's property. A fanning system inside the tunnel forced the emission of the gases and smoke from the tunnel. As to the first activity, the Court denied compensation because it was the kind of harm normally incident to railroading operations. *Id.* at 554-55, 34 S.Ct. at 657-58, 58 L.Ed. at 1091-92. As to the second activity – gases and smoke from the tunnel – the Court concluded the plaintiff was entitled to compensation for the "special and peculiar damage" resulting in diminution of the value of the plaintiff's property. *Id.* at 557, 34 S.Ct. at 658, 58 L.Ed. at 1093.

Richards is viewed as recognizing the taking of a property interest or right "to be free from 'special and peculiar' governmental interference with enjoyment." Stoebuck, at 220. The taking involved "no kind of physical taking or touching – none whatever." *Id.* Viewed in this light, *Richards* "entirely does away with the requirement of a physical taking or touching." *Id.; see* Nichols § 6.01, at 6-9 n. 11 ("It is not necessary, in order to render a statute obnoxious to the restraint of the Constitution, that it must in terms or in effect authorize an actual physical taking of the property or thing itself, so long as it affects its free use and enjoyment. . . . ").

(c) Liability of government for a taking by the operation of a nuisance-producing governmental enterprise. With regard to private nuisances,

> [t]he power of the legislature to control and regulate nuisances is not without restriction, and it must be exercised within constitutional limitations. The power

> cannot be exercised arbitrarily, or oppressively, or unreasonably. . . . It has been broadly stated, as an additional limitation to the power of the legislature, that the legislature may not authorize the use of property in such a manner as unreasonably and arbitrarily to infringe on the rights of others, as by the creation of a nuisance. So it has been held that the legislature has no power to authorize the maintenance of a nuisance injurious to private property without due compensation.

66 C.J.S. *Nuisances* § 7, at 738 (1950).

Thus, the state cannot regulate property so as to insulate the users from potential private nuisance claims without providing just compensation to persons injured by the nuisance. The Supreme Court firmly established this principle in *Richards*, holding that "while the legislature may legalize what otherwise would be a public nuisance, it may not confer immunity from action for a private nuisance of such a character as to amount in effect to a taking." *Richards*, 233 U.S. at 553, 34 S.Ct. at 657, 58 L.Ed. at 1091; *see also Pennsylvania R.R. v. Angel*, 41 N.J. Eq. 316, 7 A. 432, 433 (1886) ("[A]n act of the legislature cannot confer upon individuals or private corporations, acting primarily for their own profit, although for public benefit as well, any right to deprive persons of the ordinary enjoyment of their property, except upon condition that just compensation be first made to the owners.").

A number of state courts have decided takings cases on the basis that the government entity operated a nuisance-producing enterprise. *See, e.g., Thornburg v. Port of Portland*, 233 Or. 178, 376 P.2d 100, 106 (1962) ("[A] taking occurs whenever government acts in such a way as substantially to deprive an owner of the useful possession

of that which he owns, either by repeated trespasses or by repeated nontrespassory invasions called 'nuisance.'"). Significantly, a large number of these cases deal with smoke and odors from sewage disposal plants and city dumps. One commentator describes the cases this way:

> Typically, a city sewage plant or dump in the vicinity of, but not necessarily directly adjacent to, the plaintiffs land has wafted its noxious smoke, odors, dust, or ashes, usually combinations of these, over the plaintiff's land, with the obvious result of lessening its enjoyment. No physical touching is present, nor do the courts try to equate the municipal acts with touchings. [Several states] have allowed eminent domain compensation in cases of this kind. . . . More significant than a court's language is the result it announces, and in this respect all the decisions stand for the proposition that nuisance-type activities are a taking. . . .

Stoebuck, at 226-27; *see also* Nichols § 6.07, at 6-112 to 6-113 ("[G]eneration of offensive odors, gases, smoke . . . may constitute a taking.").

The commentator ascribes a name to the theory of these cases: condemnation by nuisance. Stoebuck, at 226. And the commentator has formulated the theory this way: "governmental activity by an entity having the power of eminent domain, which activity constitutes a nuisance according to the law of torts, is a taking of property for public use, even though such activity may be authorized by legislation." *Id.* at 208-09; *see also City of Georgetown v. Ammerman,* 143 Ky. 209, 136 S.W. 202, 202 (1911) (holding that odors from city dump adjacent to plaintiff's property created a nuisance that was a taking of the property); *Ivester v. City of Winston-Salem,* 215 N.C. 1,1 S.E.2d 88, 88-90 (1939) (holding as part of fundamental

law of North Carolina that odors from disposal plant next to plaintiff's property constituted a nuisance and were a taking; North Carolina has no constitutional provision for a "taking"); *Brewster v. City of Forney,* 223 S.W. 175, 178 (Tex. Com.Ct.App.1920) (holding under Texas Constitution that odors from a nearby sewage disposal plant resulted in a taking of plaintiff's property); Nichols § 6.07, at 6-112 (stating under broad view of property – right to use, exclude, and dispose – there need not be a physical taking of the property or even dispossession; any substantial interference with the elemental rights growing out of property ownership is considered a taking).

One court long ago anticipated the so-called condemnation by nuisance theory this way:

> Whether you flood the farmer's fields so that they cannot be cultivated, or pollute the bleacher's stream so that his fabrics are stained, or fill one's dwelling with smells and noise so that it cannot be occupied in comfort, you equally take away the owner's property. In neither instance has the owner any less of material things than he had before, but in each case the utility of his property has been impaired by a direct invasion of the bounds of his private dominion. This is the taking of his property in a constitutional sense.

Pennsylvania R.R. v. Angel, 7 A. at 433-34.

Our own definition of a taking is in accord with this concept:

> [A] "taking" does not necessarily mean the appropriation of the fee. It may be anything which substantially deprives one of the use and enjoyment of his property or a portion thereof.

Phelps v. Board of Supervisors of County of Muscatine, 211 N.W.2d 274, 276 (Iowa 1973) (holding that construction of a bridge and causeway over river in such a manner as to allegedly cause greater flooding on adjacent property than previously was a "taking" within the meaning of the Iowa Constitution).

As mentioned, the Board's approval of the applicants' application for an agricultural area triggered the provisions of section 352.11(1)(a). The approval gave the applicants immunity from nuisance suits. (Significantly, section 352.2(6) allows an agricultural area to include activities such as the creation of noise, odor, dust, or fumes.) This immunity resulted in the Board's taking of easements in the neighbors' properties for the benefit of the applicants. The easements entitle the applicants to do acts on their property, which, were it not for the easement, would constitute a nuisance. This amounts to a taking of private property for public use without the payment of just compensation in violation of the Fifth Amendment to the Federal Constitution. This also amounts to a taking of private property for public use in violation of article I, section 18 of the Iowa Constitution.

In enacting section 352.11(1)(a), the legislature has exceeded its authority. It has exceeded its authority by authorizing the use of property in such a way as to infringe on the rights of others by allowing the creation of a nuisance without the payment of just compensation. The authorization is in violation of the Fifth Amendment to the Federal Constitution and article I, section 18 of the Iowa Constitution.

The district court erred in concluding otherwise.

D. The remedy. In *Agins v. Tiburon,* the California Supreme Court held that when legislation results in a taking, the landowner's remedy is to seek a declaratory judgment action that the legislation is invalid because it makes no provision for payment of just compensation. 157 Cal.Rptr. 372, 598 P.2d 25, 28 (Cal.1979); *see* 1 Nichols, *Eminent Domain §* 1.42(1), at 1-157 (3d rev. ed.1997). The court, however, refused for policy reasons to allow the landowner to sue in inverse condemnation for temporary takings damages. Temporary takings damages represent the damages the landowner suffers up to the time the court declares a statute invalid because it violates constitutional provisions for payment of just compensation. This was the holding in *Agins* under both the federal and state just compensation clauses. *Id.; see* 26 Am.Jur.2d *Eminent Domain* § 137 (1996) ("The constitutional requirement of just compensation may not be evaded or impaired by any form of legislation, and statutes which conflict with the right to just compensation will generally be declared invalid.").

Later, the United States Supreme Court had occasion to review the California rule in *First English Evangelical Lutheran Church of Glendale v. County of Los Angeles, California,* 482 U.S. 304, 107 S.Ct. 2378, 96 L.Ed.2d 250 (1987). The Court held that invalidation of the offending legislation without compensation for the taking is a constitutionally insufficient remedy for a taking under the Federal Just Compensation Clause. In addition to invalidation, the landowner is entitled to takings damages (temporary taking) that occurred before the ultimate invalidation of the challenged legislation. *Id.* at 319-21, 107 S.Ct. at 2388-89, 96 L.Ed.2d at 266-68.

Here the neighbors seek no compensation. Rather, they seek only invalidation of that portion of section 352.11(1)(a) that provides immunity against nuisance suits. We therefore need not concern ourselves with damages for any temporary taking. Accordingly, we hold unconstitutional and invalidate that portion of section 352.11(1)(a) that provides for immunity against nuisance suits. We reach this result under the Fifth Amendment to the Federal Constitution and also under article I, section 18 of the Iowa Constitution.

We reverse and remand for an order declaring that portion of Iowa Code section 352.11(1)(a) that provides for immunity against nuisances unconstitutional and without any force or effect.

We reach this holding with a full recognition of the deference we owe to the General Assembly. That branch of government – with some participation by the executive branch – holds the responsibility to sort through the practical realities and, through the political process, reach consensus in highly controversial public decisions. Those decisions demand our sincere respect. The rule is therefore that "[a] challenger must show beyond a reasonable doubt that the statute violates the constitution and must negate every reasonable basis that might support the statute." *Johnston v. Veterans' Plaza Authority*, 535 N.W.2d 131, 132 (Iowa 1995). The rule finding constitutionality in close cases cannot control the present one, however, because, with all respect, this is not a close case. When all the varnish is removed, the challenged statutory scheme amounts to a commandeering of valuable property rights without compensating the owners, and sacrificing those rights for the economic advantage of a few. In short, it

appropriates valuable private property interests and awards them to strangers.

The same public that constituted the other branches of state government to make political decisions with an eye on economic consequences expects the court to resolve constitutional challenges on a purely legal basis. We recognize that political and economic fallout from our holding will be substantial. But we are convinced our responsibility is clear because the challenged scheme is plainly – we think flagrantly – unconstitutional.

REVERSED AND REMANDED.

All justices concur except LARSON and ANDREASEN, JJ., who take no part.